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OF THE SEVERAL STATES.

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By A. C. FREEMAN.

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(29)

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

ESTATE OF FAY.

[145 Cal. 82, 78 Pac. 340.]

HOLOGRAPHIC WILLS.—A Mistake in Dating a Holographic Will, as where the figures "1859" were used when "1889" were probably intended, does not invalidate it. (p. 19.)

APPEAL AND ERROR.—An appeal taken within sixty days after the entry of an order refusing to admit a will to probate is in time, and the evidence may be considered thereon. The section of the code relating to appeals within sixty days from the rendition of the judgment is not applicable. (p. 21.)

APPEAL AND ERROR.—Who May Appeal.—Beneficiaries Under a Trust Created by a Will are entitled, as aggrieved parties, to appeal from an order refusing to admit it to probate. (p. 21.)

APPEAL AND ERROR.—Question Which Will not be Considered.—Though the right of the appellants to appeal from an order refusing the probate of a will is placed on the ground that they are beneficiaries under a trust in such will, the appellate court will not determine the validity of the trust as to them. (p. 21.)

Louis S. Beedy, for the appellants.

Bart Burke and Charles J. Pence, for the respondents.

⁸³ **COOPER C.** This is an appeal from an order refusing to admit to probate an instrument purporting to be the holographic will of deceased.

The instrument was entirely in the handwriting of deceased, and bore date "May twenty-fifth, eighteen hundred and fifty-nine." It is not claimed that the deceased was not of sound mind, nor that the purported will was not his free act and deed. In the instrument the deceased made provision for his son Luke Fay, who was born in 1861; for his son, John Fay, who was born about 1865; and for his daughter, Mary Monteleagre, who was married to Carlos F. Monteleagre in

January, 1887, and died March 29, 1900. It is thus evident, from the testimony, that the instrument was not written in 1859, but at some time between the marriage of the daughter and her death. If we were to indulge in conjecture, we would say that the will was written May 25, 1889, the words "fifty-nine" being by mistake or carelessness inserted instead of the words "eighty-nine." There does not appear to be any explanation as to the discrepancy in the date which the instrument bears and the actual date or time when it was executed. No reason is suggested, and none suggests itself to us, as to any object the deceased could have in dating the instrument "eighteen hundred and fifty-nine." He had the right to make a holographic will, provided he complied with the statute in so doing. It is declared in the Civil Code (section 1277) that "a holographic will is one that is entirely written, dated, and signed by the hand of the testator himself." This is the same provision as in the Code Napoleon. The instrument in this case is a holographic will, unless we hold that the word "dated" in the above section means the actual and correct time when the instrument was written. The legislature has not used the words "truly dated" nor "correctly dated,"⁸⁴ but the word "dated," which must be construed according to the approved usage of the language (Civ. Code, sec. 13), and in its primary and general sense: Code Civ. Proc., sec. 1861. If we should hold that the word "dated" means the true and correct time when the will was written, then any difference shown between the date given in the instrument and the time when it was written would invalidate it. If, under such rule a testator, in his right mind, by his own hand, should write his will and date it January 1, 1903, and it should be shown by oral evidence to have been written January 1, 1904, the will would be void; and yet we know by constant experience that business men many times during the first few days of the new year write the date of the old. And also many times we get the wrong impression as to the day of the month, and instead of the correct date write the date as of the day preceding, or even of the following day. The word "date" or "dated" is often used as referring to the date or time written in an instrument; thus it is provided in our code that any date may be inserted in a negotiable instrument, whether past, present, or future: Civ. Code, sec. 3094. The Century Dictionary defines the verb "date" "to make with a date, as a letter or other writing." A will, other than a holographic will is not required to be dated, and as to all other wills, parol evidence is

admissible to show the true date, even if contradictory of the written date: Underhill on Wills, sec. 268. A holographic will must be dated, for the reason that the legislature has said so, but we do not think it would be a sound rule to hold that any mistake or error in the date would invalidate the will. It will be presumed that the date given is the true date. We apprehend that cases will rarely occur in which this is not so. If it becomes necessary in any case upon a question as to the sanity of the testator, or probably other questions, the true time at which the will was made may be inquired into, but we hold that simply showing that a holographic will was made at a time different from that written therein will not invalidate it. The date is not the material thing, although made necessary by the statute. It is a means of identification, and aids in determining the authenticity of the will; but the main and essential thing is, that the will be wholly written and signed by the hand of the testator. The origin of holographic ⁸⁶ wills arose probably under the civil law where among unsolemn privileged wills was that of a father bestowing his property on his children, all in his own handwriting: 1 Brown on Civil and Admiralty Law, 290. A holographic will may be proved in the same manner that other private writings are proved: Code Civ. Proc., sec. 1309. A private writing may be proved by evidence of the genuineness of the handwriting of the maker: Code Civ. Proc., sec. 1940. We do not mean to be understood as holding that a holographic will must not be dated, because that is made essential by the statute. Our attention has not been called to any case directly in point, nor have we been able to find any.

It is said in *Bement & Dougherty v. Trenton Locomotive etc. Co.*, 32 N. J. L. 515: "The primary signification of the word 'date' is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time given or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item or of a charge in a book of account is not necessarily the time when the article charged was in fact furnished, but simply the time given or set down in the account in connection with such charge."

In Underhill on Wills (section 181) it is said: "Where the date is given it may be contradicted by parol, though until that

is done it will be presumed, in a case of holograph, that the will was executed upon the date which is stated in it."

The language of the Civil Code of Louisiana is the same in meaning as the section of our code in regard to holographic wills. It was held by the United States circuit court in *Gaines v. Lizardi*, 3 Woods, 77, 9 Fed. Cas. 1042, that where the proof showed that a holographic will was written and signed by the testator, and bore date of some day in a designated month, but did not show of what particular day, that it was a sufficient compliance with the provisions of the code as to dating. The case involved the probate of a holographic will which had been lost or destroyed, but it illustrates the point in the case at bar. In case of a holographic will which has been lost or destroyed it might be impossible to prove the ²⁰ day of the month, or even the month, in which it was executed, and yet the evidence might be clear and convincing that the will was entirely written, dated and signed by the hand of the testator. Should the courts, in such cases, exclude the will from probate because the correct time at which it was written could not be proven? In *Estate of Skerrett*, 67 Cal. 587, 8 Pac. 181, the deceased in his lifetime signed a deed purporting to convey certain property to his sister. The record in the case shows that the deed was dated April 26, 1881, and acknowledged before a notary April 27, 1881. The deed was never delivered, and therefore could not take effect as a deed. It was not of a testamentary character, and could not be given effect by itself, as a holographic will. But a copy of the deed in the handwriting of deceased was found after his death in an envelope with a letter addressed to the sister. The letter was without date, but showed an intention clearly expressed in his handwriting that his sister should have the property. The time at which the copy of the deed was made by deceased did not appear, nor was there anything to indicate the time when the letter was written, except that it was some time after the acknowledgment of the deed. This court said: "Neither the copy of the deed nor the letter, taken by itself, constitutes a will; the one is not testamentary in its character, and the other has no date; but taking them together as the deceased left them, forming one document, it is complete. The first part furnishes the date, and the latter the testamentary character." Now, it appears evident, in the above-cited case, from the contents of the letter, that the copy of the deed and the letter must have been made after the date of acknowledg-

ment. There was in fact nothing to show when the copy was made, but it contained a date, and with the letter the holographic will was held good. The case was followed and approved in *In re Soher*, 78 Cal. 478, 21 Pac. 8. In *Estate of Lakemeyer*, 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961, a holographic will was headed: "New York, Nov. 22, '97," and it was held that the will was dated, the abbreviation "'97" meaning 1897. Therefore, it appears to be the rule of this court, as of all other courts, to construe wills as valid in preference to holding them void.

It is provided in the Civil Code (section 1326) that of two modes of interpreting a will, that is to be preferred which ⁸⁷ will prevent a total intestacy. The supreme court of Louisiana adopted the above liberal rule in *Heirs of McMichael v. Bankston*, 24 La. Ann. 451, in which it was held that where two words in a holographic will were not in the handwriting of deceased, but did not change the meaning nor alter the dispositions made by the testator, the will would be upheld. When a man of sound mind and memory, by his own hand and signature, has plainly made a disposition of his property, the courts should carry out his intention if it can be done without violating the mandates of the law.

Respondent contends that this appeal was not taken within sixty days after "the rendition of the judgment," and hence the evidence cannot be considered on this appeal. The appeal was taken within sixty days after the entry of the order, and was within time. The section of the code in regard to rendition of judgments does not apply: Code Civ. Proc., sec. 963, subd. 3; *In re Smith*, 98 Cal. 636, 33 Pac. 744; *Estate of Scott*, 124 Cal. 675, 57 Pac. 654. The stipulation shows "that the testimony of the appellant John Fay and the testimony of Luke Fay, set forth in full in said transcript, was the only evidence adduced at the hearing of the petition for the probate of said will contained therein." Appellants are parties aggrieved and entitled to appeal. They are beneficiaries under a trust created by the will, and the court will not here determine the validity of the trust clause as to appellants: Code Civ. Proc., sec. 1299; *Estate of Cobb*, 49 Cal. 599; *Estate of Murphy*, 104 Cal. 554, 38 Pac. 543; *Graham v. Birch*, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339, and note.

It follows that the order should be reversed.

Gray, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.

Shaw, J., Angellotti, J., McFarland, J.,
Lorigan, J., Henshaw, J., Beatty, C. J.

HOLOGRAPHIC WILLS.

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I. Definition.

A holographic will is one written entirely by the hand of the testator: Bouvier's Law Dictionary, title "Holograph"; Bapalje & Lawrence's Law Dictionary, title "Holograph"; Neer v. Cowhick, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588; note to Lagrave v. Merle, 52 Am. Dec. 591. Where, however, there is a codicil, the will and the codicil may be considered separately, and one be holographic and the other not. Hence, to a will not in the handwriting of the testator, but duly witnessed and attested, there may be a codicil wholly in his handwriting, and therefore, though not witnessed, entitled to admission to probate as a holographic will: In re Soher, 78 Cal. 477, 21 Pac. 8. Though every holographic will is in the handwriting of the testator and by him subscribed, it is obvious that not every paper subscribed and wholly written by the same person is a holographic will. It must, except in so far as the statute provides otherwise, possess the same requisites as other wills. It must have a testamentary purpose sufficiently expressed and be executed by one having testamentary capacity, acting without coercion, fraud or undue influence. It is not the purpose of this note, however, to discuss the subject of wills generally, nor of holographic wills in the respects in which they resemble or are subject to the same rules as other wills, but rather to point out the features peculiar to the former.

II. The Requisites of are Prescribed by Statute.

A paper is not necessarily entitled to probate because it is testamentary in scope and wholly written by the testator and attested by his signature, for the whole subject of wills is under statutory control, and every paper presented as a will, whether holographic or not, must conform to the requisites of the statute. At the common law and by the earliest statutes upon the subject of wills witnesses thereto were not required, and a holographic will must have been good, though not witnessed, because it would have been equally good though not holographic, provided it had been executed by the testator. The necessity for witnesses resulted from the statute of 29 Charles II, chapter 3, relating to frauds and perjuries. It is believed that in each of the states of this Union statutes have been enacted without compliance with which no will is entitled to admission to probate or to otherwise be given effect as a will. Such being the case, the requisites of holographic wills must be found in those statutes, and where they prescribe any general rule respecting the execution and attestation of wills, such rule is equally applicable to holographic wills, and the fact that a will is wholly in the handwriting of the testator does not exempt it from the rule. Thus, if a statute declares that all wills to be valid must be in writing, witnessed by two competent witnesses, and signed by the testator or by some person in his presence and by his direction, and that a holographic will may be proved in the same manner that other private writings are proved, wills of the latter class are still subject to the provision requiring witnesses: *Neer v. Cowhick*, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588. So a statute may impose limitations upon holographic which do not apply to other wills, or may provide that persons competent to make the latter are not competent to make the former. Thus, if a statute declares that a married woman may dispose of her separate estate by will without the consent of her husband, and may alter or revoke the will as if she were single, and that her will must be attested, witnessed and proved in like manner as are other wills, she cannot make a holographic will, though the same statute recognizes the general right to make such wills: *Scott v. Harkness*, 6 Idaho, 736, 59 Pac. 556. The various statutes recognizing holographic wills agree in requiring them to be subscribed and wholly written by the testator. Most of such statutes require such wills to be also dated by him, and omit the requirement of attestation by witnesses. By the provisions of some of the statutes such wills must be found among the valuable papers or effects of the deceased, or be lodged in the hands of another for safekeeping. In a few, witnesses are not dispensed with. In others, provision is made for the manner of proving that the writing is that of the testator and the number of witnesses who must testify to that fact.

III. What Writings Amount to.

Provided it conforms to the statutory requisites in other respects, any writing or combination of writings (Estate of Skerrett, 67 Cal. 585, 8 Pac. 181) may constitute a holographic will, if it expresses, however informally, a testamentary purpose in language sufficiently clear to be understood. Sums bequeathed may be stated in figures as well as in words: Succession of Vanhille, 49 La. Ann. 107, 62 Am. St. Rep. 642, 21 South. 191. "To the validity of a will the law does not require it should assume any particular form, or that any technically appropriate language should be used therein, if the intention of the maker is disclosed and the distribution of his property at his death is designated." Hence, a paper which commences with a synopsis of some of the principal events of the writer's life and a statement of property acquired by him, and that Charlie Webster has helped him to improve it, and concluding, "I have requested my executors to give a clear deed for the property after my death to Maggie, his wife, and Charlie," is entitled to admission to probate as the will of the writer. The fact that he labored under a mistaken impression that it was necessary for his executors to make a conveyance does not prevent the writing from operating as his will: Webster v. Lowe, 107 Ky. 293, 53 S. W. 1030. It will be seen from this that it is not necessary for the writer to know that the paper which he writes will amount to a will or otherwise fully accomplish his purposes. It is sufficient that he manifests his wish that, on his death, his property, or some part of it, shall go to another person by him designated: Outlaw v. Hurdle, 1 Jones (46 N. C.), 150; Estate of Knox, 131 Pa. St. 220, 17 Am. St. Rep. 798; 18 Atl. 1021, 6 L. E. A. 353. Nor is it necessary that such designation be so complete that parol evidence is not necessary to make it understood. Thus, the words, "Dear old Nance: I wish to give you my watch, two shawls, and also five thousand dollars," properly dated and subscribed by the writer, is a holographic will, and parol evidence is admissible to prove who is the person whom he designated as "Old Nance": Clarke v. Ransom, 50 Cal. 595. It is sufficient that the will merely states that the person named therein is the testator's heir if it is also indorsed in his handwriting as his will: Succession of Ehrenberg, 21 La. Ann. 280, 99 Am. Dec. 729. A will may take the form of a direction to the testator's executors to pay the beneficiaries a sum specified at a future designated date: Pena v. Cities of New Orleans and Baltimore, 13 La. Ann. 86, 71 Am. Dec. 506. A holographic will may be contained in, or be a part of, a letter written by the testator to the beneficiary or to another: Buffington v. Thomas (Miss.), 36 South. 1039; Barney v. Hayes, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. 282; Alston v. Davis, 118 N. C. 202, 24 S. E. 15; or may consist of an entry in the testator's diary: Reagan v. Stanley, 11 Lea, 316.

Whether directions for the writing of a will may of themselves constitute a holographic will is not free from doubt. A paper en-

titled, "Directions how I want my will wrote," was denied admission to probate in Virginia, but the reasons for such denial were not stated by the court, and, as they may have related to the uncertainty of the directions thus referred to and the impossibility of ascertaining from them, even if so admitted, what disposition was made of the property therein referred to, the case can hardly be regarded as authority on one side or the other of the question: *Hocker v. Hocker*, 4 Gratt. 277. In *Barney v. Hayes*, 11 Mont. 99, 571, 28 Am. St. Rep. 495, 29 Pac. 282, 384, it appeared that the testator, after having executed a will which was duly attested by witnesses, married, and subsequently wrote to his attorneys referring to his marriage, and stating, "Now, what I want is for you to change my will so that she will be entitled to all that belongs to her as my wife. I am in very poor health and would like this attended to as soon as convenient." Application was made for the admission to probate of this letter as a codicil to the pre-existing will. It was conceded that the marriage had revoked the original will, but that if the letter could be admitted as a codicil, it republished the will, and that the will and codicil together constitute the last will and testament of the decedent. "The whole gist of the case," said the court, "therefore, is whether said letter was a codicil; that is, whether it was testamentary in character. The court submitted to the jury a great number of questions, which seemed to have included all matters of fact in the case. The court also required the jury to determine whether said letter was a codicil. The jury said it was." The trial court set aside this finding and held that the letter was not a codicil. Its action was reversed upon appeal, the appellate court holding that the words contained in the letter "disclosed an animus testandi," that the reasonable construction of the letter was that the testator wished his wife to have a certain portion of his estate, and that no one could read the letter and be in any doubt as to what the decedent intended should be the disposition of his property to his wife, and that such intention being clear, the intent must not be ignored because the language was not technical: *Barney v. Hayes*, 11 Mont. 99, 571, 28 Am. St. Rep. 495, 29 Pac. 282, 384.

IV. Requisites Peculiar to Holographic Wills.

a. Construction of Statutes Providing for.—It must be remembered, in the first instance, when we speak of requisites peculiar to holographic wills, we refer only to such wills as are admissible to probate only on the ground that they are holographic. As already suggested, a will, in addition to being signed by the testator and wholly in his handwriting, may also have been executed with all the formalities required of wills not holographic. In such a case, it may be admitted to probate without for any purpose considering the fact that it is wholly in the testator's handwriting, and it is not subject to the statutory provisions peculiarly applicable to holo-

graphic wills. These provisions, when properly applicable, are quite strictly enforced by the courts. The omission of any of them will not be overlooked on the ground that it is beyond question that the paper was executed by the decedent as his will while he possessed abundant testamentary capacity and was free from fraud, constraint, or undue influence, and there is no question of his testamentary purpose and no obstacle to carrying it into effect had his will been executed in the manner prescribed by the statute: *Estate of Rand*, 61 Cal. 468, 44 Am. Rep. 555; *Succession of Armant*, 43 La. Ann. 310, 26 Am. St. Rep. 183, 9 South. 50; *Baker v. Brown*, 83 Miss. 793, 36 South. 539; *Warwick v. Warwick*, 86 Va. 602, 10 S. E. 843, 6 L. R. A. 795. When, on the other hand, the paper offered has been executed in compliance with all the requisites imposed by the statutes, the courts will construe it on the same principles applicable to other wills, by seeking to ascertain, though its language is untechnical and ungrammatical, or words are omitted from it, what was the intention of the testator, and by giving effect to that intention, whenever lawful, and thus capable of ascertainment. Hence the words, "Crolldepdro, february 3, 1892, this is to serifye that ie levet to mey wife Real and persnal and she to dispose for them as she wis," may be construed as if it had been written, "Corral de Piedra, February 3, 1892. This is to certify that I leave to my wife (my) real and personal (property), and she to dispose of them as she wishes": *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614. Though certain words taken by themselves have no apparent connection with other portions of the will, "the testatrix must be deemed to have written them with the intention that some effect should be given them, and that intention, so far as it can be gathered from the will itself and the circumstances under which it is executed, is to be ascertained by the court and effect given thereto accordingly. The order in which the words of a will are written is not determinative of the testator's intention, and under a well-recognized rule this order will be transposed if thereby the intention of the testator can be ascertained. So, too, a word that has been manifestly omitted and is essential to an understanding of the intention of the testator will be supplied": *In re Stratton*, 112 Cal. 513, 44 Pac. 1028.

b. **Must be Wholly in the Handwriting of the Testator.**—A will cannot be holographic if any part of it is not in the handwriting of the testator. The material with which it is written is immaterial. It may be in pencil as well as in ink: *Philbrick's Heirs v. Spangler*, 15 La. Ann. 46; *Estate of Knox*, 131 Pa. St. 220, 17 Am. St. Rep. 798, 18 Atl. 1021, 6 L. R. A. 353. Whether in ink or in pencil, every part of it must be in the testator's handwriting. Hence, if a printed form has been used, so that the paper consists partly of such print- and partly of clauses written by the testator, no part of it can be admitted to probate as his holographic will: *In re Rand's Estate*,

61 Cal. 468, 44 Am. Rep. 555; *Williams' Heirs v. Hardy*, 15 La. Ann. 284. The same result must follow if the will is written on a printed letter-head, some of the words or figures of which constitute an essential part of the will: *In re Billing's Estate*, 64 Cal. 427, 1 Pac. 701; *Succession of Robertson*, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 South. 586. Perhaps, where it appears that all the words necessary to a completely executed will are in the handwriting of the testator, it may be admitted to probate, though it is proved that a few other words are in the handwriting of another: *McMichael v. Bankston*, 24 La. Ann. 451; and certainly this is true where the words are written preceding the will as a mere caption: *Baker v. Brown*, 83 Miss. 793, 36 South. 539.

The question whether a holographic will may, by referring to another paper not in the handwriting of the testator, make it a part of the will is not free from doubt. In Virginia, where it appeared that a will had been drawn purporting to give all the testatrix's property to her sisters Margaret and Sallie, but had not been subscribed or otherwise executed, and that the testatrix had written on the same sheet of paper, "As Margaret is dead, I give her share to my niece Lizzie Leigh Gibson," and followed this with her signature and the proper date, it was held that this latter writing could not be admitted to probate. It was conceded that had the original will been duly executed, the additional writing would have been entitled to probate as a codicil thereto, but a majority of the court was of the opinion that, as the original will was never duly executed, nor in the handwriting of the testatrix, the subsequent writing could not be admitted to probate as a codicil or otherwise: *Gibson v. Gibson*, 28 Gratt. 44. Like doubt seems not to exist when the paper referred to is in the handwriting of the testator. In *Estate of Skerrett*, 67 Cal. 585, 8 Pac. 181, it appeared that the decedent signed and acknowledged a deed of gift to his sister which never became operative for want of delivery. Afterward he sent her a letter containing a copy of the deed, declaring that nothing further was necessary than to have it recorded, and that the property therein described would then become hers, and that he wanted her to know that she was provided for under all circumstances, and that if it should please God to call him away, she would have her own property to depend on, sufficient to make her independent while she lived. The copy of the deed, as well as the letter, was in the decedent's handwriting. It was held, reversing the judgment of the trial court, that the deed itself could not be admitted to probate as a will, because it contained no words of testamentary character, but that the copy and the letter, though neither in itself constituted a will, because the one was not testamentary in character and the other had no date, together as one complete document, clearly showed an *animus testandi*, and were entitled to admission to probate.

c. The Dating.

1. *Necessity for.*—We believe that all the statutes authorizing the admission to probate of holographic wills as such require them to be dated. Failure to respect this requirement is fatal to the will: *In re Martin's Will*, 58 Cal. 530; *Fuentes v. Gaines*, 25 La. Ann. 85; *Heffner v. Heffner*, 48 La. Ann. 1088, 20 South. 281. Though all the rest of it is conceded to be in the handwriting of the testator, if the date is proved to have been written by another, it must be denied admission to probate: *Estate of Behrens*, 130 Cal. 416, 62 Pac. 603. The whole of the date must be in the testator's handwriting. Hence, if he writes his will on a letter-head, using the figures printed thereon as part of the date and without considering such figures, the date cannot be known, the will cannot be supported as a holographic will: *Succession of Robertson*, 49 La. Ann. 868, 62 Am. St. Rep. 672, 26 South. 586.

2. *Abbreviations in the Date* are permissible if they are such as are in common use, easily understood, and leave no question of the date intended to be expressed. Hence, the words, "New York, Nov. 22/97," constitute a good dating. "In this case the expression under consideration is entirely unambiguous, and to everyone familiar with the usage of language it expresses the month, day and year as clearly as though these had been written out in full. It is, or rather, during the century just expired, it was, the common usage—universally understood—to designate the year by the last two figures of its number, omitting the figures designating the century": *In re Lakemeyer's Estate*, 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961.

3. *Essential Elements of a Dating.*—A dating is not sufficient to satisfy the requirements of the statute if it omits either the day, the month or the year: *Fuentes v. Gaines*, 25 La. Ann. 85; *Heffner v. Heffner*, 48 La. Ann. 1088, 20 South. 281; though when the existence of the will is in issue, as where its admission to probate as a lost will is sought, it is sufficient that the testimony shows that it was dated on some day in a designated month and year without specifying that day, if the inference, supported by the testimony, is that the day was specified in the will, though the witnesses testifying do not remember what it was: *Gaines v. Lizardi*, 3 Woods, 77, Fed. Cas. No. 7175. If a will in the handwriting of the testator closes with the proper dating and signing, and is followed by a further clause signed by the testator, but bearing no separate date, such clause will be presumed to have been written at the same time as the original will, and therefore the whole will be deemed to be properly dated: *Lagrange v. Merle*, 5 La. Ann. 278, 52 Am. Dec. 589. It is not essential that the date stated truly represented the time when the will was written or signed. An obvious mistake in this respect is not fatal to the will: *Estate of Fay*, 145 Cal. 82, ante, p. 17, 78 Pac. 340. Whether his action is due to a mistake or not, the

testator may adopt as the date of his will any date previously written by him: *Estate of Clisby*, 145 Cal. 407, post, p. 58, 78 Pac. 394. We must confess that the reasoning upon which these decisions are placed goes far toward establishing that the requirement of dating is directory rather than mandatory, and is, to us, entirely unsatisfactory so long as it is conceded that the requirement must be obeyed.

4. The Place Where the Date Must be Written is not prescribed by the statute, and hence it is not material in what part of the instrument it appears: *Zerega v. Percival*, 46 La. Ann. 590, 15 South. 476. It may follow the signature: *Succession of Fuqua*, 27 La. Ann. 271; or even be found on a piece of paper different from that which expresses the testamentary purpose and to which the signature of the testator is written. Thus, where a testator sent to his sister what purported to be a copy of a deed conveying certain property to her, dated April 26, 1881, and acknowledged on the day following, enclosed in a letter bearing no date, but showing his intention that she should have such property at his death, such copy and letter were together held to constitute a holographic will, and to justify such holding, it was necessary for the court to adopt, and it did adopt, the date as expressed in such copy as the date of the holographic will: *Estate of Skerrett*, 67 Cal. 585, 8 Pac. 181.

d. The Signature.

1. Necessity for.—At the common law a will of personal property in the testator's handwriting was good, though without his signature and unwitnessed, and in some of the states a common-law will is still sufficient in exceptional circumstances, as when made by a soldier in actual service or a mariner at sea for the purpose of disposing of his wages and personal estate: *Leathers v. Greenacre*, 53 Me. 561. The general rule, however, is that wills must be signed by the testator, and special reasons exist for the rule and its enforcement when the will is not witnessed. The absence of the testator's signature upon what is claimed as a holographic will must be regarded as fatal, except in cases where the common law has been left in force as to soldiers and sailors.

2. What Constitutes.—The statutes requiring the signing of wills by the testator have rarely, if ever, declared what constitutes a signing or signature, and, while there are many decisions upon that subject in its relation to other wills, there are few indicating whether the results reached are equally applicable to wills which have been admitted to probate only on the ground that they are holographic. The question whether a signature to a will may consist of the testator's mark cannot arise, because the existence of the balance of the will in his handwriting demonstrates his ability to write, and hence the absence of any necessity for using a mark. There is certainly no need of his writing his name in full, but it is doubtless sufficient

that the signature written is that ordinarily used by him in other business transactions. It may probably consist of initials, or even of a fictitious or assumed name. "The title by which a man calls himself and is known in the community is his name, whether it be the one he inherited or had originally given him or not. So the form which a man customarily uses to identify and bind himself in writing is his signature, whatever shape he may choose to give it. Nor is there any fixed requirement how much of the full name shall be written." Hence a holographic will signed only by the testatrix's given name "Harriet" was upheld: *Estate of Knox*, 131 Pa. St. 220, 17 Am. St. Rep. 798, 18 Atl. 1021, 6 L. R. A. 353.

3. *The Place for the Signature.*—In holographic as in other wills, the place of the signature is not material unless made so by statute. It need not be at the end: *In re Johnson's Estate*, Myr. Prob. 5; *In re Donoho's Estate*, Myr. Prob. 140; *In re Barker's Estate*, Myr. Prob. 78. It is true that the name of the testator written in the body of the will cannot be treated as his signature when not intended to be such: *In re Armant's Will*, 43 La. Ann. 310, 26 Am. St. Rep. 193, 9 South. 50; and that where, as in Virginia, the statute declares that the name of the testator written in a will shall not be regarded as his signature unless there is something on the face of the paper indicating that it was intended to be such, the mere presence of such name in the will in his handwriting cannot be accepted as his signing or signature in the absence of any such intention so appearing: *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564; *Ramsay v. Ramsay*, 13 Gratt. 664, 70 Am. Dec. 438; *Roy v. Roy*, 16 Gratt. 418, 84 Am. Dec. 696. Still the general rule is, in the absence of some statutory prohibitions, that the name of the testator written by him either in the introductory or closing clause of his will constitutes his signature: *In re Camp's Estate*, 134 Cal. 233, 66 Pac. 227; *Lawson v. Dawson's Estate*, 21 Tex. Civ. App. 361, 53 S. W. 64; and even under the Virginia statute, the concluding clause of a will stating "I, William Dinning, say this is my last will and testament," sufficiently indicates that the name so written was intended as the signature of the testator, and entitles the will to admission to probate as holographic: *Dinning v. Dinning*, 102 Va. 467, 46 S. E. 473. Not at all reconcilable with what we have said upon this subject is the decision in *Re Booth's Estate*, 127 N. Y. 109, 24 Am. St. Rep. 429, 27 N. E. 826, 12 L. R. A. 452. The will there in question was witnessed and attested by two persons and was wholly in the handwriting of the testatrix, and though not otherwise signed by her, contained her name in the opening clause and also her maiden name at the end. One of the subscribing witnesses testified that the testatrix said to her, "This is my will; take it and sign it." The court held that this evidence was insufficient to sustain a finding or verdict that the testatrix's name written by her in the first line of the document was there written with the intent that it should have effect as her signature in the final execution of the will, saying: "Whenever the name of a

testator appears, whether in the body or at the end of a will, it must have been written with intent to execute it, otherwise it is without force. When a testator or the maker of a contract subscribes it at the end and in the manner in which legal instruments are usually authenticated, a presumption arises that the signature was affixed for the purpose of creating a valid instrument. But when the name is written near the beginning of the document, where, as a rule, names are inserted by way of description of the person who is to execute it, and rarely as signatures, it must, before it can be held to have been inserted for the purpose of validating the instrument, be proved to have been written with that intent."

The following summary of the French doctrine upon the subject appears to meet the approval of the supreme court of Louisiana: "Although the natural place of the signature be at the end of the act, because it expresses the final approval given by the testator to the dispositions of last will which he has made, it is, however, admitted that the writing by the testator of his name toward the end of the act may be considered as a signature, if it is placed after all the dispositions constituting the testament. It does not matter that after the name there may follow some words connected with it, if the words thus following are superfluous or useless." In the case whence this quotation is made it appeared that the will in question commenced with a caption as follows: "Testament d'Aglæe Armant." The court was of the opinion that the name as thus written could not be accepted as signature, partly upon the ground that it was not written in the ordinary manner of a signature and was "without a paraph," the evidence showing that the testatrix ordinarily employed one, and further, "that the coupling of the 'd' with the name, in itself excludes the idea of its being intended as a signature." The decision was also partly upon another ground which the court thus expressed: "Even apart from the name's not being at the end of the testament, we think the proof does not show that she intended to sign at all. It simply shows that she did not think or know that a signature was essential. If she had known that it was necessary that the testament should be signed, it is impossible to conceive how, in so important a matter, she should have acted so ambiguously and so differently from the course universally pursued by her in signing other acts and documents of every description. The simple fact is, she did not know that a signature was necessary, and therefore did not sign. Her mistake in this respect is unfortunate in the interests of justice, but it cannot save the will."

e. Witnessing and Attesting.

1. *Necessity for.*—The authorities, in so far as they speak upon the subject, indicate that the recognition of holographic wills does not exempt them from the general provisions contained in the statutes respecting the manner of witnessing and attesting wills. Hence,

in the absence of any statutory provision to the contrary, holographic wills must be published, witnessed and attested in the same manner as others, but criticism of the term of what is claimed to be a sufficient publication need not be so severe as where the will is not wholly in the testator's handwriting: *Trustees v. McKinstry*, 75 Md. 188, 23 Atl. 471; *Matter of Application of Becket*, 103 N. Y. 167, 8 N. E. 506; *Matter of Hunt*, 110 N. Y. 281, 18 N. E. 106; *Matter of Turrell*, 47 App. Div. 560, 62 N. Y. Supp. 1053; 166 N. Y. 330, 59 N. E. 910; *In re Aker's Will*, 173 N. Y. 620, 66 N. E. 1103, 74 App. Div. 461, 77 N. Y. Supp. 643; *Neer v. Cowhick*, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588. In many of the states, however, holographic wills need not be published nor witnessed, nor otherwise attested than by the testator's signature. In other words, such a will is entitled to admission to probate on proof in the manner required by statute that it is wholly written, dated, and signed in the handwriting of the testator: *Ariz. Rev. Stats.*, ed. 1887, secs. 3234, 3235; *Cal. Civ. Code*, sec. 1277; *Idaho Rev. Stats.*, sec. 5728; *Scott v. Harkness*, 6 Idaho, 736, 59 Pac. 566; *Toebbe v. Williams*, 80 Ky. 661; *Webster v. Lowe*, 107 Ky. 293, 53 S. W. 1030; *La. Civ. Code*, arts. 1581, 1588; *Williams v. Hardy*, 15 La. Ann. 286; *Buffington v. Thomas* (Miss.), 36 South. 1039; *Barney v. Hays*, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. 282; *Outlaw v. Hurdle*, 1 Jones (N. C.), 150; *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15; *Estate of Knox*, 131 Pa. St. 220, 17 Am. St. Rep. 798, 18 Atl. 1021, 6 L. R. A. 353; *Reagan v. Stanley*, 11 Lea, 316; *Lawson v. Davison's Estate*, 21 Tex. Civ. App. 361, 53 S. W. 64; *Dinning v. Dinning*, 102 Va. 467, 46 S. E. 473; *West Va. Laws*, ed. 1882, c. 84, sec. 3.

2. **Unsigned Clause of Attestation.**—A will, though holographic may be followed by an attestation clause, or may otherwise indicate that the testator intended to have it witnessed and attested in the same manner as if not holographic. In such circumstances, if there are no subscribing witnesses, or not a sufficient number of them, or one is incompetent to act as such, it may be claimed that the testator had designed to complete the execution of the will as if it were not holographic, and that, because of his failure to do so, it cannot be admitted to probate. The answers, however, have been uniform to the effect that if the will was executed in the manner required of holographic wills, it was entitled to admission to probate notwithstanding the fact that the testator intended to execute it in the presence of subscribing witnesses and believed such presence essential to its validity: *In re Soher*, 78 Cal. 477, 21 Pac. 8; *Toebbe v. Williams*, 80 Ky. 661; *Andrews' Heirs v. Andrew's Exrs.*, 12 Mart. (O. S.) 713; *Succession of Roth*, 31 La. Ann. 315; *Brown v. Beaver*, 48 N. C. 516, 67 Am. Dec. 255; *Hill v. Bell*, 61 N. C. 122, 93 Am. Dec. 583; *Allen v. Jeter*, 6 Lea, 672; *Perkins v. Jones*, 84 Va. 358, 10 Am. St. Rep. 863, 4 S. E. 833.

V. The Place Where the Will was Lodged or Found is generally not material, but in two of the states it must have been found among the valuable papers and effects of the decedent, or have been by him lodged with another person for safekeeping: *Winstead v. Bowman*, 68 N. C. 170; *Tate v. Tate*, 11 Humph. 464. The meaning of these requirements has not been much litigated. The decedent may have two or more places in which he keeps papers and valuables, and one may be so far superior to the other, or so much more resorted to by him as a depository of his valuables that a holographic will found in the other will not be admitted to probate: *Little v. Lockman*, 49 N. C. (4 Jones) 494. Nevertheless, the circumstances must be rare in which the courts will consider, as between two places where valuable papers and effects are kept, which is the only one in which a holographic will may be safely placed, and if found in either place, it will generally not be refused probate because the court deems the other the safer place or the one which the decedent has been in the habit of leaving the more valuable papers and effects: *Winstead v. Bowman*, 68 N. C. 170. The depository may be a drawer in a desk or bureau (*Hughes v. Smith*, 64 N. C. 493; *Harrison v. Burgess*, 8 N. C. (1 Hawks Eq.) 384), or a trunk left for safekeeping with a friend (*Hill v. Bell*, 61 N. C. (Phil. L.) 122, 93 Am. Dec. 583), if therein are left the valuable papers and effects of the decedent. Of course, the real question is, whether from the place where the will is found, the inference is reasonable that the testator left or caused it to be left there as and for his holographic will: *Marr v. Marr*, 2 Head, 303; *Hooper v. McQuary*, 5 Cold. 129; *Douglass v. Harkrender*, 3 Baxt. 114. The surroundings and habits of one person may be such as to make it exceedingly improbable that he used a depository, the use of which in the case of another person would be entirely reasonable. It is sufficient that the testator kept or preserved his will in the same manner that he kept other valuable papers: *Winstead v. Bowman*, 68 N. C. 170; *Tate v. Tate*, 11 Humph. 464. As to the will itself, it need not be a separate or formal document, but may be written in a book of accounts, if such book is found with other valuable papers of the decedent: *Brown v. Eaton*, 91 N. C. 26. From the finding of a will among the papers of the decedent, it will be presumed that he placed it there on the day it bears date: *Sawyer v. Sawyer*, 52 N. C. (7 Jones) 134. By valuable papers is not necessarily meant deeds, important contracts, etc., or papers of great pecuniary value, but simply such papers as the decedent seems to have regarded as important to him and to the preservation of which he has given the same attention as to his holographic will: *Marr v. Marr*, 2 Head, 303.

The mere finding of a will among the papers of a third person is not sufficient to show that it had been left with him by the testator for safekeeping: *St. John's Lodge v. Callender*, 26 N. C. (4 Ired.)

of the testator: *Harrison v. Burgess*, 8 N. C. (1 Hawks Eq.) 384. Where the will is a part of a letter written by the testator to another, it is not necessary that the latter should have received any instructions from the former respecting its preservation or safekeeping: *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15.

VI. Proving.

Most of the statutes respecting holographic wills have not made any provision for their proof, and where such is the case, it is evident that they may be proved in the same manner as other wills, with the addition of competent and satisfactory evidence showing that they were wholly written, dated and signed by the testator, and where that fact is made essential by the statute, that they were found among his valuable papers and effects or were left by him with some third person for safekeeping. In at least two states, however, the handwriting of the decedent must have been generally known, and that the will is in his handwriting must be established by the testimony of at least three persons: *Ex parte Horner*, 27 Ark. 443; *Tate v. Tate*, 11 Humph. 465.

BLUNT v. FIDELITY AND CASUALTY COMPANY.

[145 Cal. 268, 78 Pac. 729.]

INSURANCE, ACCIDENT—Application.—A Clause cannot be Eliminated from a Policy on the ground that it is not expressly referred to in the application. (p. 35.)

AN INSURANCE Against Accident may Exclude Injuries Received by the Assured While Insane, though not self-inflicted, nor due to his want of sanity. (p. 36.)

INSURANCE Against Accident—Stipulation Excluding Liability During Insanity.—A policy insuring against accident, but providing that for injuries received while the assured was insane, the measure of liability of the insurer should be a sum equal to the premium paid, does not warrant a recovery for injuries received during a period of insanity, though not self-inflicted nor due to want of sanity. (p. 36.)

INSURANCE Against Accident—Words not to be Interpolated in the Policy.—Where a policy insuring against accident exempts the insurer from liability for injuries intentionally inflicted on himself by the assured, or inflicted upon himself or received while insane, the court cannot interpolate the word "intentionally" before the second clause, and hold the insurer liable for injuries received by the assured while insane, though not intentionally inflicted or received. (p. 37.)

M. V. Morehouse and J. E. Alexander, for the appellant.

A. E. Shaw, for the respondent.

²⁶⁶ SHAW, J. The plaintiff appeals from the judgment. The suit is upon a policy of insurance, of the kind usually designated as an accident policy, issued by the defendant to John P. Blunt for the term of twelve months. It provided that if death should result from an injury within ninety days from the time the injury was received, the defendant would pay to the wife of the insured, if she survived him, the sum of five thousand dollars. The fourth clause of the policy was as follows: "4. In case of injuries, fatal or otherwise, intentionally inflicted upon himself by the assured, or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy." At the end of twelve months the policy was renewed for the same period, and at the end of that time it was again renewed. During the last year of the insurance John P. Blunt became insane and was committed to the Mendocino State Hospital. During the term of insurance, and ²⁷⁰ while insane, he fell against a steam radiator in the hospital and thereby received injuries from which, within ninety days thereafter, he died. The plaintiff is the surviving wife of the assured. Before the action was begun the defendant tendered her the full amount of the premium paid, and in its answer it offered to allow judgment for that sum in favor of the plaintiff. The court found these facts, and gave judgment in favor of the plaintiff for the sum tendered and against the plaintiff in favor of the defendant for its costs.

In contracts of insurance, as in other contracts, the rights of the parties are determined from the terms of the contract, so far as it is lawful. The contract here in question consisted of the application for insurance made and delivered by the assured to the defendant and the policy of insurance made and delivered by the defendant to the assured. It cannot be conceded that the company was not at liberty to insert conditions in the policy which were not mentioned in the application. The application contained the affirmative stipulations and warranties made by the assured, and the policy contained the stipulations and limitations made by the insurer. The two together constitute the contract. If the policy of the company, which was issued by the company upon receipt and approval of the application, had contained any clause to which the assured did not agree, he, of course, would have been at liberty to reject it, and either demand a rescission and return of the premium paid, or insist upon a policy without

the clause to which he did not assent. But when he received the policy and accepted it without objection, and especially when, as the record here shows, with the policy in his possession, he twice renewed it for an additional year, neither he nor the beneficiary can with good reason claim that there is anything contained in it to which he did not fully consent and agree. The fourth clause above quoted is not unlawful, and it cannot be eliminated on the ground that it is not expressly referred to in the application.

The effect of this clause is, that the defendant did not agree to insure the policy-holder against injuries from accidents received by him during such part of the time covered thereby as the assured should be insane, except to the amount of the premium paid, and this regardless of the question whether the injuries were inflicted by himself, intentionally²⁷¹ or otherwise, or were received by him from some other cause.

Insurance during such insanity, except to that extent, was simply not a part of the contract, and the agreement in that contingency was, that the company should be liable only for a sum equal to the premium paid. Language could not express this idea more clearly than it is expressed in the policy. The courts have always construed in favor of the assured every ambiguity and uncertainty in contracts of insurance. But where the words are clear and free from uncertainty and the meaning plain, the contract as made by the parties is beyond the power of the courts to change by a forced construction. There was good reason for the insertion of the clause. A sane man will naturally and instinctively protect himself from injury, while if insane he might unconsciously expose himself thereto. It is to be presumed that in fixing the amount to be paid as a premium the company took into consideration its proposed exemption from full liability during such insanity, if it should occur, and reduced the premium accordingly. The assured received the benefit of this clause in the reduced amount of the premium, and hence the contract cannot be deemed inequitable or unfair.

The appellant contends that the fourth clause should be construed by interpolating the word "intentionally" a second time, making it read thus: "In case of injuries fatal or otherwise intentionally inflicted upon himself by the assured; or intentionally inflicted upon himself or received by him while insane," etc. It is obvious that this would be an unfair and forced construction. The natural inference from the context is, that the element of intent was designedly omitted with re-

spect to injuries happening to him while insane; so that in case of injury while he was insane, either consciously or unconsciously inflicted by himself, or received by him while in that condition, whether by reason of his consequent inability to avoid injury or from causes entirely apart from his insanity, the company should be liable only to the amount of the premium. The language used seems well adapted to convey this meaning, and it is apparent that the word "intentionally" was purposely omitted from the second clause in order to avoid any question on that point.

The cases holding that a provision exempting an insurance company from liability if the assured shall commit suicide while insane does not give exemption where the suicide is the result of the insanity go upon the theory that the use of the term "suicide," or other similar description of the mode of death, implies a conscious and voluntary self-destruction, and not an act impelled by the insane delusion, and, in that sense, involuntary. They do not apply to this policy, which makes the insane condition, and not the volition of the assured, the test of nonliability.

The judgment is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

The Right of Parties to an Insurance Contract to insert such conditions therein as they see fit, so long as they are lawful, and the binding effect of such conditions, are recognized in the recent case of Mead v. Phoenix Ins. Co., 68 Kan. 432, post, p. 412, where it is decided that a stipulation in a policy limiting the time within which suit may be brought thereon is good even as against minor beneficiaries.

WALSH v. ABBOTT.

[145 Cal. 285, 78 Pac. 715.]

DEEDS, Construction of.—A conveyance of the undivided one-third of the north half of a specified tract of land, "together with all the right, title, interest and demand whatsoever which I had or may have in or to the same or any part or parcel thereof," is not restricted to the north half, but conveys all the grantor's title to the whole tract, including the south half thereof, and hence transfers whatever interest may vest in him by a subsequent patent. (pp. 41, 42.)

John O'B. Wyatt, E. W. McGraw and Rodgers, Paterson & Slack, for the appellants.

H. O. Beatty, M. R. Jones, Hartley & Abbott, A. A. Moore, George A. Lamont, W. S. Goodfellow, Garret E. McEnerney, Sanborn & Beatty and Chickering & Gregory, for the respondents.

286 HENSHAW, J. By this action plaintiffs sought to have partition of the southeast quarter of the Rancho Medanos, in Contra Costa county. The rancho lies on the southern bank of the San Joaquin river and Suisun bay. The plaintiffs claim as heirs at law of James Walsh, deceased, and seek to establish his ownership in an undivided one-third interest in the southeast quarter of the rancho, claiming that by succession it has devolved upon them.

In 1839 the Mexican government granted the Rancho Medanos to José Antonio Mesa and José Miguel Garcea. Mesa and Garcea in 1849 granted to J. D. Stevenson the southern half of the tract of land known as Medanos. Their deeds were recorded in 1851. In 1850 Mesa and Garcea in like manner granted to Michael Murray, James Walsh and Ellen Fallon the north half of the same tract. These deeds were recorded in June, 1850. Upon August 2, 1850, James Walsh, by deed of that date, granted to Martin Murphy the undivided one-third of the northern half of the Rancho Medanos. This deed was recorded in 1851. On the day of the execution of the deed by Walsh to Murphy, Stevenson brought suit in the third district court of the state against the Garceas, the Mesas, and their grantees, Murray, Walsh and Fallon, to reform and correct the deed to him and to the other grantees, and to partition the rancho. The suit was based upon an alleged error of description running through **287** all the deeds. It consisted in describing the San Joaquin river as bounding the rancho on the east, when

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in fact it formed the northern boundary.
a judgment favorable to Stevenson's content
exchange between Stevenson upon the one
Walsh and Fallon upon the other, where
to Stevenson the west half of the rancho,
and Fallon the east half thereof. Subse
quently, Murray, Walsh and Fallon filed w
commissioners their petition for the conf
In that year, or in the year after, James V
ceesings had before the board of land con
the United States district court for the no
for the grant was confirmed, the west
east half to Murray, Walsh and Fallon,
1882, the United States issued its patent t
plaintiffs for title introduced the deeds
reference has been made, and supplement
that James Walsh, the patentee, was neve
immediate kin, brothers and sisters, all
without issue, saving one brother, who wa
titled, who died in 1887, and whose death w
his wife, leaving no other issue than the
The court, upon motion of defendants
titled upon this showing, and the soundne
and is here attacked.

Sundry propositions are urged by re
the court's order. We pass them by,
merit, but because they go merely to th
of the proof to establish title by s
As, for example, it is urged that t
show that both the original James W
these plaintiffs had not, by will, devised
lands in question; that there is no presu
that the ruling of the court was proper
points, though only for the argument w
concede that some title to the rancho r
subject to his legal disposition by gra
passed by because their 289 considera
in view of the conclusion we hav
his deed to Martin Murphy, divested
deed is as follows:

"Know all men by these presents,
and in consideration of the sum of
in hand paid by Martin Murphy, of

fornia at or before the en sealing and delivery of these present the receipt whereof I do hereby fully confess and acknowledge I have given, granted, sold and conveyed, and by these presents do give, grant, sell and convey unto the said Martin Murphy, his heirs and assigns forever, the undivided one-third of all the northern half part of all that certain tract of land situate in upper California, known by the name of 'Medanos' or 'Meganos' and bounded as follows: On the north by River San Joaquin on the south by Jonathan D. Stevenson, on the east by Doctor Marsh, and on the west by Salvio Pacheco.

"Together with all the estate, right, title, interest and demand whatsoever which I had or may have of, in or to the same or any part or parcel thereof, to have and to hold the aforesaid premises with all right, privileges and appurtenances thereunto belonging unto the said Martin Murphy, his heirs, assigns, executors and administrators to his and their use and behoof forever.

"In testimony whereof, I have hereunto affixed my hand and seal this 2d day of August, Anno Domini, one thousand eight hundred and fifty.

"JAMES WALSH. (Seal.)"

The contention of appellants is, that Walsh by this deed divested himself only of such title as he had to the northern half of the rancho, and that as by the patent from the United States he and his cotenants Murray and Fallon were granted the eastern half of the rancho, he still retained his undivided interest in the south half of that east half.

The particular part of the deed calling for construction is the quitclaim clause beginning with "together with all the estate, right, title," etc. If it shall be found that the true meaning and intent of Walsh was to grant his undivided one-third interest in the northern half of the rancho, which was all of the interest in the rancho to which he then had paper title, and that the quitclaim clause had reference only to this northern half, the construction for which appellants contend will be established. If, upon the other hand, the view of the respondents, which view was adopted by the trial court, is the true one, then, by this clause, Walsh divested himself of all of his interest in and to all of the rancho, and the effect of the patent from the United States to Walsh was not to create a new title in him, but to confirm in his grantees, through him, the title which had formerly been his: *Stark v. Barrett*, 15 Cal. 362; *Moore v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. Rep. 1069, 32 L. ed. 51.

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Certain familiar principles of construction are involved: 1. As between the parties to the deed, it is *Walsh* *more strongly* in favor of the grantee; 2. It is *Walsh* *if possible* so as to give all of its operative words effect; and 3. If any doubt still exists as to the intention of the parties, the subject matter at the time of the execution of the instrument: *Brannan v. Mesick*. The first of these principles requires no special effort to the second, it is to be noted that the construction given by appellant gives no meaning nor effect to the quitclaim clause. According to this construction, *Walsh*, having made his deed of grant to all of his northern half, in the next breath quitclaims to him the same property. Such a construction makes of the question nothing but empty and useless verbiage, *Walsh* *the other hand*, to construe it as respondents contend *Walsh* *the* *construed* would give reasonable and effective force to the deed. The deed would then stand to mean that *Walsh*, having conveyed by grant to which he had paper title, as further assurance of title to his grantee, and, to save the possibility of conflict over boundaries, quitclaimed to him whatever right he had in all of the rancho. Under this construction "same" has reference to the Rancho "Medanos" or *Walsh* *previously* employed in the deed, and in the subsequent found in the habendum clause, "to hold the aforesaid premises" is referable to the word "same". The belief that such was the true intention of *Walsh* *fairly* expressed in his deed becomes fixed when it is *Walsh* *paid* to the surrounding circumstances. *Walsh* *of one-third* of an uncertain half of the rancho. *Walsh* *title* it was the northern one-half. It is fairly *Walsh* *known* that it was in question and in dispute *Walsh* *half* it was within which his land lay. It is fairly *Walsh* *known*, that he knew this at the time he made his deed, *Walsh* *because* the suit to determine this question was brought *Walsh* *day* he made his deed, and it is not to be *Walsh* *made* a suit would have been commenced without *Walsh* *made* by Stevenson to reconcile these differences *Walsh* *Murray* and Fallon by an exchange of deeds without *Walsh* *of the* intervention of a court. It seems in every *Walsh* *to conclude*, therefore, that *Walsh* knew that his

one-third of the north half was disputed; that the result of the dispute could only be one of two things, to confirm him in the ownership of that particular piece, or to assign to him the ownership of one-third of some other one-half, as was actually done. Was it, then, the intention of Walsh in conveying to Murphy for a valuable consideration to give him a title to a limited piece which title might prove valueless, or was it his intention to convey to him the title which he apparently had to one-third of the north half, and for his grantee's further protection to assure him in this title, should it prove defective, by a quitclaim of whatever interest it might be found in truth that he did have? There can be no hesitation in saying under all of these circumstances that the latter was the true intention of the grantor.

For the foregoing reasons the judgment appealed from is affirmed.

McFarland, J., and Lorigan, J., concurred.

The Construction of a Grant must be favorable, and as near the meaning and intention of the parties as the rules of law will admit: Lego v. Medley, 79 Wis. 211, 24 Am. St. Rep. 706. In construing a conveyance, the court should give effect to the intent of the parties, and in ascertaining such intent, the circumstances surrounding the conveyance and the situation of the parties are to be considered: Kinney v. Hooker, 65 Vt. 333, 36 Am. St. Rep. 864; Easley v. Spooner, 23 Neb. 470, 8 Am. St. Rep. 128. Generally speaking, a deed must be upheld if possible: Edwards v. Bowden, 99 N. C. 80, 6 Am. St. Rep. 487.

PACIFIC VINEGAR AND PICKLE WORKS v. SMITH.

[145 Cal. 352, 78 Pac. 550.]

EXPRESS RATIFICATION can be Found Against a Party Only when it is shown that he was in possession of all the facts and acted after such knowledge. (p. 45.)

CORPORATION, Implied Ratification by, When not Inferable. A corporation does not impliedly ratify an act by accepting its benefits, if the board of directors have no knowledge of the transaction which is claimed to have been ratified, and the president and secretary, who are the only officers having knowledge of it, conceal it from all the other members of such board and deny its existence, and the president is the person who afterward insists that the act was ratified and attempts to assert rights founded on such ratification. (p. 46.)

CORPORATIONS, Transactions of Officers of, When not Sustainable.—One who is president and director of a corporation holds toward it a fiduciary and trust relation, and if he purchases notes belonging to it and indorses them to himself without the authority,

knowledge or approval of the corporation, he cannot enforce such contract of indorsement against it. (p. 49.)

CORPORATION.—An Officer of a Corporation is not Qualified to act for his company in any transaction wherein the corporation is dealing with the officer. (p. 50.)

PRINCIPAL AND AGENT—Same Person Acting as Agent for Both Parties.—Any contrivance which reduces the two parties to one, and admits the agent representing antagonistic interests to make a bargain for himself in so far against the policy of the law that the contract must be held void, unless the principal chooses afterward, with knowledge of all the circumstances that affect his position, to ratify the act of his agent. (p. 50.)

CORPORATIONS, Officers of Dealing with Themselves.—A person cannot, as director or other officer of a corporation, enter into a valid contract with himself in his individual capacity, or be both vendor and vendee. (p. 50.)

J. C. Campbell, W. H. Metson, Campbell, Metson & Campbell and John Garber, for the appellant.

Carter P. Pomeroy, for the respondent.

³⁵⁴ **HENSHAW, J.** From the decision of this court in *Bank*, rendered in the above-entitled cause February 11, 1904, and hereafter set forth, a rehearing was granted, to the end that a finding made by the trial court, to the effect that the Pacific Vinegar and Pickle Works ratified and approved each and every indorsement placed upon the notes of the California Packing Company by Smith as president and King as secretary, should receive further consideration. It was urged in ³⁵⁵ the petition for rehearing that although the principle of ratification was fully recognized in the opinion, through some oversight the finding declaring a ratification, which finding fully supported the judgment of the trial court, had been overlooked.

Our attention, therefore, upon this hearing is limited to the single question whether or not the finding of ratification is supported by the evidence. Respondent contends that the finding is supported, first, under evidence showing express ratification, and, second, under evidence showing implied ratification.

1. The express ratification, it is contended, finds support in the evidence of Mr. Koster, the vice-president of the pickle works, who, during a three months' absence of the president, Mr. Smith, performed the latter's duties. During Koster's incumbency as president he indorsed three of the California Packing Company's notes. Respondent in his brief asserts that "Mr. Koster himself testifies that at the time he made this indorsement he knew that at least one of those notes belonged to Mr. Smith, although he denies any personal knowledge of the fact that he was effecting a renewal." The evidence of Mr.

Koster, with the inferences and deductions which may legitimately be drawn from it, is the only evidence touching express ratification. Mr. Koster's testimony, however, is at variance with respondent's statement of it. It is brief, and may be set forth in full: "I never knew until March, 1900, that Mr. Smith had assigned or indorsed any of those notes to himself. I never knew that there was any notes of the California Packing Company in existence outside of those which we held in the safe amounting to twelve thousand or fifteen thousand dollars. By reason of what had been told me at the directors' meetings I believed it was all paid up. I acted as vice-president of the company during Mr. Smith's absence. During that time I indorsed three notes, one of which may have belonged to Mr. Smith, but I did not know that any of them were renewal notes. I never knew anything about renewals. I was told that some money was needed from the bank and I indorsed some California Packing Company paper which the Pacific Vinegar and Pickle Works had, for the purpose of getting money to run the business. I knew that the company had paper of the California Packing Company, but did not know any of it ³⁵⁶ was renewed until after Mr. King's defalcation. I did not see any renewal notes brought to me. If there had been any renewal notes brought to me that would have stopped right there. No notes were brought to me which had already been renewed by the Pacific Vinegar and Pickle Works. In every instance I asked Mr. King if the notes of the California Packing Company were being paid and he told me 'Yes.'" It is to be remembered that the directors, one and all, testified that they had no knowledge of any of these transactions; they knew nothing of the existence of the California Packing Company notes held by Smith upon which their company (the pickle works) was liable as indorser, and that at every directors' meeting, in the presence and hearing of Mr. Smith, the president, they asked if the California Packing Company's notes were being paid at maturity, and always received an affirmative answer from the secretary. Bearing in mind that an express ratification can only be found against a party when it is shown that he is in possession of all the facts, and has acted after such knowledge, it is at once apparent without further discussion that the testimony of Mr. Koster falls far short of establishing such a ratification.

2. The doctrine of implied ratification is invoked to support the finding. The doctrine of implied ratification is thus expressed: "An implied ratification may also arise if the corporation accepts the benefit of the unauthorized act, but a corpora-

tion will not be held to have ratified an act impliedly by accepting the benefit of it unless knowledge of the act was actually possessed by some corporate agent who had authority to act for the corporation in the matter, or whose function it was to report it to the proper authorities, or unless knowledge of the act would have been possessed by some such agent had there not been neglect of duty on his part, the consequences of which are to be borne by the corporation rather than by the party from whose performance it has been benefited. Consequently, in order to constitute an implied ratification on the part of the corporation arising from acquiescence, or from accepting the benefit of an act, it may not be necessary that the circumstances should be such as to warrant a jury in finding actual knowledge on the part of the corporation, or corporate agents competent to ratify, for the knowledge of one agent may, at least in the absence of proof to the contrary, ²⁸⁷ be imputed to other agents who have authority to do the acts in question, or even to the corporation": Taylor on Private Corporations, 2d ed., secs. 214, 215.

It is urged that the facts in this case show that the corporation received the benefit of the money paid by its president, Smith, in discounting the notes of the packing company, and that as the secretary, King, joined with Smith in indorsing the name of the pickle works upon the notes, and as it was King's duty to inform the corporation of these facts, the negligence upon his part in not doing so is not negligence of which the corporation can avail itself while retaining the proceeds of the notes; and that, therefore, by conclusive implication the corporation had knowledge of the transaction and thus ratified it. The whole structure, it is to be observed, is built upon the somewhat flimsy foundation of a mere disputable presumption—a presumption which, while in strictness evidence, has been characterized as evidence "the weakest and least satisfactory." The case here presented is not at all parallel with those where the directors themselves are in fault for not knowing the things with knowledge of which they are sought to be charged. Here it affirmatively appears that knowledge of these transactions was concealed from the board of directors, not by the secretary, King, alone, but by the president of the company, who was drawing a salary for his services, who attended the directors' meetings, and who never, such is the record, informed his board as to any of these matters, but sat silent when his directors asked as to the payment of the notes of the California Packing Company, and when the secretary answered with the false statement that they were being

promptly met. It appears, therefore, that the directors did what in reason they might have been expected to do—made inquiries in open board—and were deceived, not alone by the answers of the secretary, but by the silence of their president, whose duty, equally with the secretary, it was to tell them the truth. So telling them, the directors would have known that their corporation stood liable upon the paper of the California Packing Company as indorser for thousands of dollars which they knew not of, that their liabilities were to this extent increased, and they would have been in a position to take steps to reduce that liability and enforce the obligations of the California Packing Company. By the method ³⁵⁸ which Smith adopted, however, they were kept in ignorance of these things, their corporate name was affixed to renewal notes, thus continuing their liability and not that alone, but continuing a corporate liability which they did not know existed. Under these circumstances it cannot be successfully argued that the president of the corporation is entitled to invoke the doctrine of implied ratification, and thus reap the fruits of his own concealment.

For the foregoing reasons, in addition to those given in the opinions above referred to, which opinion is hereby adopted and affirmed, the judgment appealed from is reversed and the cause remanded.

McFarland, J., Lorigan, J., Van Dyke, J., and Beatty, C. J., concurred.

The following is the opinion above referred to and approved, which was rendered in Bank February 11, 1904:

LORIGAN, J. These cases are both presented on a consolidated transcript on appeal, and as the same general principles of law are applicable to both, they will be considered together.

The first action is brought by the Pacific Vinegar and Pickle Works (which for brevity will hereafter be referred to as the pickle works or corporation), to enjoin the said Sidney M. Smith from selling or transferring certain promissory notes not yet due, given by a corporation known as the California Packing Company to said Pickle Works, and indorsed by said Smith as president of the latter to himself; also for the cancellation of such indorsements.

The second action is brought by said Sidney M. Smith against the pickle works, to obtain judgment on notes executed

by the same packing company to the pickle works, and similarly indorsed and held by him.

The pleadings in both cases fully raise the legal question to be disposed of, and the facts under which it is presented are as follows:

Said Sidney M. Smith was at all the times herein mentioned a director and president of the pickle works, and the by-laws thereof provided that "he shall sign as president all certificates of stock, checks, notes, bills payable, acceptances, ^{and} bills of exchange, contracts, and other instruments in writing, and shall have full power to act in all respects as the general agent and manager of the company subject to the advice of the board of directors"; that said pickle works was doing business with a corporation known as the California Packing Company, under a contract which provided that the pickle works should supply the California Packing Company with material, and binding the latter not to contract with any other parties for such material; that the pickle works sold goods to the packing company under such contract, and, upon monthly statements rendered notes were given by the latter in favor of the former, indorsed by one A. B. Patrick; that some of said notes so delivered were retained by the pickle works, some respondent Smith had discounted by the Bank of British Columbia for the benefit of the pickle works, and others were purchased by said Smith, in which latter case, as when discounting them to the bank, he transferred the same by an indorsement of the name of the Pacific Vinegar and Pickle Works thereon, by himself as president; that when he purchased said notes from the pickle works he paid over for its benefit the face of the principal and accrued interest thereon, and that no better terms could have been obtained at a bank.

On December 13, 1899, said Smith held notes of said packing company so indorsed, and maturing on that date, amounting to the sum of sixteen thousand nine hundred and ninety-two dollars and twenty-eight cents, which on that day he surrendered, and took from said packing company a series of notes, each for about fifteen hundred dollars, maturing monthly. These renewal notes were also indorsed by A. B. Patrick, and when delivered to said Smith by the packing company he indorsed them to himself as before with the name of the Pacific Vinegar and Pickle Works, by himself as president; that said renewal notes were so taken at the request of the packing company, and were drawn in such series of small amounts so that

said company could meet them monthly, and were renewed that the time of payment might be extended.

Aside from the renewal notes, Smith held other notes of packing company, purchased by him from the pickle works and similarly indorsed. Of these, three, for upward of five hundred dollars each, were paid by the packing company to respondent Smith in September, October and December 1899, and of the renewal notes of December 16, 1899, three fifteen hundred dollars each were likewise paid him in January, February, and March, 1900. No payments were made during these periods of any of the notes executed by the packing company to the pickle works and retained by it although at times the secretary of the latter had in its safe unpaid notes of said packing company, which in March, 1900, amounted from twelve to fifteen thousand dollars, besides which there were outstanding, on that date, notes of said company, indorsed by the pickle works, by said Smith as president, and held by the Bank of British Columbia, amounting to about twenty thousand dollars. That none of the other four members of the board of directors of the pickle works had any knowledge of these transactions. It further appears that the pickle works is solvent. As to the actual condition, in that respect, of the packing company or A. B. Patrick, the prior indorser of the notes, the record is silent, although it appears from the evidence that the packing company had stated to Smith that it could not pay its bills monthly and pay the full amount of the notes, and it was for that reason that he had put them in such a shape as to mature in the neighborhood of fifteen hundred dollars per month. These are some of the principal facts in the case, and are all that are necessary here to be stated in order to fully present and consider the main proposition of law involved.

Judgments were rendered in favor of Sidney M. Smith in both actions: in the first, for his costs; in the second, for the amount of the notes therein sued on (seven thousand six hundred and fifty-four dollars and ninety-six cents); and from both judgments the pickle works appeals.

Several points are made by appellant for a reversal, but we will consider only the main one, which we deem controlling and decisive of the case. The others are merely subsidiary and unimportant.

Broadly stated, the legal proposition insisted on by appellant is, that one occupying a fiduciary or trust relation to a corporation cannot, while such relation exists, enter into an

express contract with himself individually relative to the trust property which will be binding on the corporation; that such a contract is a breach of trust, and voidable at ~~and~~ the mere election of the corporation, if not absolutely void; and that when such a contract is sought to be enforced, the court will not permit any investigation as to the fairness or unfairness of the transaction nor will it permit the trustee to show that it was not detrimental, or that it was even advantageous to the beneficiary. Such an inquiry cannot be entered into.

And specially applying the rule to the facts in the case at bar, it is claimed that as the respondent Smith, at the time he acquired ownership of said notes, occupied a fiduciary and trust relation to appellant corporation, both as president and director, and that as the contracts of indorsement guaranteeing the payment of said notes by said corporation were made by himself as president to himself individually, without the authority, knowledge or approval of the corporation, they cannot be enforced by him against it. We are satisfied that this contention of appellant is sound and sustained, not only by the code provisions of this state, but by an unbroken line of authorities.

It will be observed that no question is involved in this action of the right of a director who has advanced or loaned money to a corporation, to recover it back on a quantum meruit, and decisions which sustain such a right have no application. The action at bar is one brought by a director who, as president of the corporation, purchased its notes outright, and caused the corporation, by himself as president, to become indorser of the notes to himself, individually, as indorsee, and is now seeking to enforce such contract of indorsement against his corporation.

His suit is brought upon an express contract, the making of which and its enforcement are equally prohibited by law.

In this regard the general principle is clearly stated in *Bensiek v. Thomas*, 66 Fed. 104, 13 C. C. A. 457: "It is an elementary law that an agent authorized to act for a principal in a given negotiation cannot deal with himself. He cannot, when authorized to buy property or borrow money, sell his own property or loan his own funds without communicating the fact to his principal. An agent cannot unite his personal and representative characters in the same transaction. The doctrine applies to all persons who occupy a fiduciary relation, and it is especially applicable to the officers of a corporation, ~~and~~ when acting for and in behalf of the company. They cannot use their official position to benefit themselves individually.

In short, an officer of a corporation is not qualified to for his company in any transaction wherein the corporation is dealing with the officer": *Wardell v. Railroad Co.*, 103 U 651, 26 L. ed. 509; *Mallory v. Mallory Wheeler Co.*, 61 C 131, 23 Atl. 708; *Bigelow on Fraud*, 217; *Perry on Trusts*, 207. And in *Morawetz on Private Corporations*, section it is said: "The directors of a corporation have no authority bind the company to any contract made with themselves personally. . . . Thus a president, cashier or managing agent, having authority to sign the name of a corporation to negotiable instruments, cannot execute or indorse a note to himself or cash a check for his own benefit."

This rule is based on sound public policy, and there enters into it the legal principle that, in order to make express contract, there must be the assent of two separate dependent minds; that no man can effectually make a contract with himself.

In the case at bar, the respondent Smith assumed to constitute himself both the contracting parties. There is no pretense that he was dealing with the corporation represented by other members of the board of directors or with other agents thereof. He was dealing with himself—contracting as president with himself as an individual, and was the contracting party on both sides. The corporation made no sale of these notes to or contract of indorsement thereof with him. He adjusted the whole matter, dictated the terms of the transfer by himself with himself, completed the transaction in this unilateral capacity, and it was the result solely of his own discretion and volition. To this situation the language of the court in *Mercantile Mutual Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 410, may pertinently be applied: "A contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterward, and with knowledge of all the circumstances that affect his possession, to ratify the act of his agent."

In *Clark & Marshall's Private Corporations*, volume 3, section 759, the rule is concisely summed up in this language: "A person cannot as director, or other officer of a corporation enter into a valid contract on behalf of the corporation with himself in his individual capacity, or be both vendor and purchaser, for two persons are necessary elements to the formation of a contract. The fact that he acts as an officer of the

corporation on one side and for himself on the other can make no difference."

Recurring now to the main legal proposition under discussion, it is provided by section 2230 of the Civil Code that "Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except when the beneficiary, having capacity to contract, with the full knowledge of the motive of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so."

And by section 2234 of the same code it is provided that "Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust."

These code provisions apply to directors of a corporation in their relation to it as trustees and by section 2322 of that code they are made to apply to the respondent, as the agent of such corporation, in the case at bar.

This last section declares that "An authority [of an agent] expressed in general terms, however broad, does not authorize an agent: 3. To do any act which a trustee is forbidden to do by article 2, chapter 1, of the last title," which chapter includes the sections above quoted.

As it does not appear in this case that the respondent had any special authority from the corporation to enter into the transaction in question here, he necessarily must claim to have been empowered to make it under an authority expressed in general terms, and hence the sections (Civ. Code, secs. 2230, 2234) in regard to trustees must apply to him as a mere agent of the corporation.

So applied, the law is inflexible, that one acting in such fiduciary capacity will not be permitted to deal with himself in his individual capacity relative to the trust property.

Upon this point, as we have said, the current of authority in this state is unbroken, and it will only be necessary to refer at length to a few of the cases which clearly and uncompromisingly announce the rule, with general citations to such others from our own court as affirm the doctrine.

In the case of *Davis v. Rock Creek etc. Co.*, 55 Cal. 364, 36 Am. Rep. 40, where the facts are stated as well as the law declared, it is said: "But apart from this consideration, the transaction in question cannot be upheld. The law, for wise reasons,

will not permit one who acts in a fiduciary capacity thus with himself in his individual capacity. The position Wolff, as a member of the firm of A. Wolff & Co., a position as trustee and president of the corporation defeated were inconsistent and conflicting. In purchasing the debts of the corporation in his individual capacity, it was to his interest to buy them at as great a discount as possible. The greater the discount the greater his gain. If he succeeded in purchasing the debts at any discount, to that extent he acted to himself an advantage not common to all of the stockholders. To permit this to be done would be to permit the violation of one of the plainest principles of equity applicable to trustees. In this particular case it does not appear that Wolff assented to the demands against the corporation at any discount, nor does it appear that he did not. Nor does the policy of the law permit an inquiry into that question. Occupying, as he did, the position of trustee he should not have put himself in a position adverse to his cestui que trust. One cannot faithfully serve two masters whose interests are diverse."

In the still later case of *Sims v. Petaluma Gaslight Co.*, Cal. 659, 63 Pac. 1012, it is said: "The court was clearly correct in holding that for the reasons stated, the contract introduced in evidence on the part of the plaintiff was invalid. Van Syckel, being president of the defendant corporation, Van Syckel necessarily was one of the directors thereof (Civ. Code, sec. 30) and as such he occupied a fiduciary relation to the corporation and its stockholders. 'A trustee may not use or deal with trust property for his own profit, or for any other purpose unconnected with the trust, in any manner': Civ. Code, sec. 2229. He cannot take part in any transaction in which he, or any one for whom he acts, has an interest, present or contingent, adverse to that of his fiduciary: Civ. Code, sec. 2229. In fact, this rule did not have its origin with the codes, but it is much older. It is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee. 'Here the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings with the trust property, with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary': *Wickensham v. Crittenden*, 93 Cal. 29, 28 Pac. 788. In *Aberdeen Ry. Co. v. Blakie*, 1 Macq. H. L. 461, it is said: 'So strictly is this principle

ciple adhered to, that no question is allowed to be raised the fairness or unfairness of the contract so entered into. *particular case* the terms of such a contract have been the *trustee has dealt*, or attempted to deal, with the estate or interests of those for whom he is a trustee have been as good as could have been better, but still, so inflexible is the rule, that no inquiry on that subject is permitted."

These authorities lay down two propositions: 1. That an expressed contract cannot be entered into by a director with himself relative to the trust property; and 2. That the court will not permit any inquiry into the question of the honesty or fairness of the transaction.

The philosophy of this rule is quite apparent, and its inflexibility is the strongest safeguard which the law can offer for the protection of the interests of the beneficiary. The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal; his self-interest prompts him to make the best bargain for himself. Humanity is so constituted that when these conflicting interests arise the temptation is usually too great to be overcome, and duty is sacrificed to interest. In order that this temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction.

As said by the supreme court of New York in *Munson v. Syracuse etc. R. R. Co.*, 103 N. Y. 74, 8 N. E. 358: "The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real

tives often elude the most searching inquiry, and it is neither to judge or jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. . . The value of the rule of equity to which we have adverted lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating without attempted discrimination all transactions in which they assume the dual character of principal and representative."

So harmonious is the law on this subject that authorities might be cited indefinitely, but reference is made only to those in this state where the principles have been discussed, reiterated, and approved: *San Diego v. San Diego* etc. R. Co., 44 Cal. 112; *Andrews v. Pratt*, 44 Cal. 317; *Wilbur Lynde*, 49 Cal. 292, 19 Am. Rep. 645; *Chamberlain v. Pacific Wool-Growers Co.*, 54 Cal. 106; *Shakespear v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327, 20 Pac. 294; *Smith v. Los Angeles Immigration Assn.*, 78 Cal. 292, 12 Am. St. Rep. 53, 20 Pac. 677; *Graves v. Mono* etc. Mining Co., 81 Cal. 319, 22 Pac. 66; *San Francisco Water Co. v. Pattee*, 86 Cal. 629, 25 Pac. 13; *Wickersham v. Crittenden*, 93 Cal. 31, 28 Pac. 788; ³⁶⁷ *Capital Gas Co. v. Young*, 109 Cal. 143, 41 Pac. 869, 29 L. R. A. 46; *Curtin v. Salmon River* etc. Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

We have examined the cases cited by counsel for respondent to support the validity of this contract and the right of respondent to recover upon it, but they have no relevancy to the real point involved. We will not discuss at all the authorities cited from other jurisdictions, and as to the cases in this state will mention them briefly and then only to point out their special inapplicability.

All the cases cited by counsel are cases where either the director of the corporation whose dealings were questioned dealt directly, but illegally, with the board of directors of a solvent corporation, assuming to act for it, or dealt with such board without the knowledge or approval of the stockholders, or they are cases where the illegal action of the director was subsequently ratified and approved by the corporate authorities. In none of these cases is it held that he could deal with himself, or that a contract made with himself without the knowledge of the other directors or the stockholders, or without the subsequent ratifica-

tion or approval of the corporation could be sustained or enforced against the corporation.

This marked distinction is plainly declared in a line from one of the cases cited by respondent (*Twin Lick Oil Co. v. Marbury*, 91 U. S. 590, 23 L. ed. 328), where the court says: "The defendant was not here both seller and buyer."

In the case at bar he was both seller and buyer, with the additional relation created by himself, with himself, of indorser and indorsee.

Referring now briefly to the authorities cited by respondent from this court:

In the case of *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802, no question of a director dealing with himself was involved. The plain point decided there was, that the corporation having borrowed money from the director Hihn, the latter was entitled to be repaid. But this is practically declared to be the rule in *Davis v. Rock Creek etc. Min. Co.*, 55 Cal. 359, 36 Am. Rep. 40, *Graves v. Mono etc. Min. Co.*, 81 Cal. 319, 22 Pac. 665, and *Sims v. Petaluma Gas Co.*, 131 Cal. 659, 63 Pac. 1012, that where the corporation has dealt with the director he can recover upon a ~~res~~ quantum meruit. Not, however, that a director can recover upon an express contract made with himself without the knowledge or sanction of the corporation.

In the case of *Sutter Street Ry. Co. v. Baum*, 66 Cal. 44, 4 Pac. 916, and *Bonney v. Tilley*, 109 Cal. 346, 42 Pac. 439, the note and mortgage involved there were given by the corporation to a director. In *Seeley v. San Jose etc. Co.*, 59 Cal. 25, the plaintiff paid off a note of the corporation at the request of its president and superintendent, and thereupon the corporation gave a note to plaintiff to secure repayment. At an annual meeting of the board of directors and stockholders this note was recognized, sanctioned, and approved by them. There was nothing in the case calling for the application of the rule declared in *Davis v. Rock Creek etc. Co.*, 55 Cal. 364, 36 Am. Rep. 40, or cases affirming a similar principle. In fact, the court in *Seeley v. San Jose etc. Co.*, 59 Cal. 25, recognized the distinction, and particularly stated in its opinion that the case then in hand was not "at all like unto *Davis v. Rock Creek etc. Co.*, 55 Cal. 364, 36 Am. Rep. 40; or like the cases of *San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 112, and *Wilbur v. Lynde*," 49 Cal. 292, 19 Am. Rep. 645, previously referred to by us in this opinion.

Neither is *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749, applicable. The only point decided there was that the corporation had ratified the contract claimed to be illegal and was bound by the ratification. These are all the cases from this court cited by counsel, and none of them run counter to, but clearly recognize the distinction between, cases where the director deals with the corporation, or his act, while illegal, is subsequently ratified by it, and cases where he deals with himself without the knowledge and approval of the corporation and where there is no ratification.

While some claim is made that the corporation in this case ratified the respondent's acts, it is only a claim; there is not only no evidence to support it but the evidence is, that none of the other officers of the corporation were informed by respondent of the matter, or knew of the transaction.

It is hardly necessary to say that the general power conferred upon Smith under the by-laws did not give him authority to contract with himself. In every case where the validity of a contract made by a trustee with himself is in question, ~~see~~ general authority to act for the corporation must necessarily have existed in order to apply the principle invoked here. The law assumes that the trustee is invested with general power to contract, but limits its exercise to matters strictly in the interest of the beneficiary, and disqualifies him from exercising it in his own behalf. This disability directly results from the existence of the general authority.

In disposing of this matter it may be said that if a director wishes to take security for advances made to the corporation it is not requiring too much of him to ask for such security, or for whatever contract he would equitably be entitled to, in order to protect his advances.

If he fails to do so, and has any equitable claim arising from such advances against the corporation he may bring an action on a quantum meruit to recover.

He cannot, however, make an express contract with himself which can be enforced against the corporation against its will; nor can the fairness of such a contract be inquired into or affect the rule.

The principles here announced apply to both cases considered on this appeal, and for the reasons given the judgments therein appealed from are reversed and the causes remanded.

Beatty, C. J., and Henshaw, J., concurred.

McFARLAND, J., Concurring. I concur in the judgment of reversal and in nearly all that is said in the opinion of Mr. Justice Lorigan; but I think that some of the quotations to be found in the opinion state the principle of law under discussion rather too broadly. It may be well to say also, that it is quite likely that the respondent Smith did not intend to do any unlawful act, and that what he did probably inured to the benefit rather than the injury of the pickle works; but well-established and just general principles of law can occasionally be invoked so as to work hardship in particular cases.

Directors of a Corporation have no right to represent it in any transaction in which they are personally interested, in obtaining any advantage at the expense of the corporation. Their relation to the corporation is that of a trustee: *Ten Eyck v. Pontiac etc. R. R. Co.*, 74 Mich. 226, 16 Am. St. Rep. 633; *Memphis etc. R. R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81; *O'Conner Min. etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 36 Am. St. Rep. 251; *Bird Coal etc. Co. v. Humes*, 157 Pa. St. 278, 37 Am. St. Rep. 727; *Hoffman v. Reichert*, 147 Ill. 274, 37 Am. St. Rep. 219. See, too, *Crichton v. Webb Press Co.*, 113 La. 167, post, p. 500; *McClure v. Law*, 161 N. Y. 78, 76 Am. St. Rep. 262; *Curtin v. Salmon River etc. Co.*, 130 Cal. 345, 80 Am. St. Rep. 132; note to *Beach v. Miller*, 17 Am. St. Rep. 298. A director's contract with his corporation is not, however, necessarily void: *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, and cases cited in the cross-reference note thereto. According to *Africa v. Duluth News Tribune Co.*, 82 Minn. 283, 83 Am. St. Rep. 424, the note of a corporation made exclusively for its benefit, by an officer thereof, to himself as payee, is valid. But see *Chemical Nat. Bank v. Wagner*, 93 Ky. 525, 40 Am. St. Rep. 206.

Ratification of a Transaction must ordinarily be with full knowledge of the facts: *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 635; *American Exchange Bank v. Loretta Min. Co.*, 165 Ill. 103, 56 Am. St. Rep. 233; *Cram v. Sickel*, 51 Neb. 823, 66 Am. St. Rep. 478.

ESTATE OF CLISBY.

[145 Cal. 407, 78 Pac. 964.]

HOLOGRAPHIC WILLS.—A Testator may Take as the Date of a Will a date previously written by him. (p. 59.)

HOLOGRAPHIC WILLS not Wholly Written on the Day Dated.—It is not material that the concluding part of a holographic will was not written on the date the will was commenced. (p. 59.)

HOLOGRAPHIC WILLS, What may Constitute.—A paper commencing with the words "Property of S. W. Clisby, October 1, 1902," followed by a list of property, after which is added the statement that at the death of the testator, all the above and any other property belonging to him is to go to his wife, all in his own handwriting and by him subscribed, is a good holographic will. (p. 60.)

Van Ness & Redman, for the appellant.

Edwin L. Forster and Robert R. Moody, for the respondents.

⁴⁰⁷ SMITH, C. This is an appeal from an order refusing to revoke the probate of a will. The appellant is Mrs. Anne ⁴⁰⁸ Clisby, the mother of deceased and contestant of the will; the respondents, Mrs. Ethel Clisby, widow of deceased and sole beneficiary under the will and Hulme, administrator with the will annexed. The will is holographic, and is in the words and figures following:

"Property of S. W. Clisby, October 1, 1902.

Deposit Union Trust Company.....	\$22,755.00
----------------------------------	------------------------

" Cal. Safe Dep. Co.....	62.50
--------------------------	------------------

	600.00
--	-------------------

J. K. Meyers Acct. Truck & Team.....	600.00
--------------------------------------	-------------------

J. D. Gove Note.....	200.00
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Louis Volmer Acct. Buggy.....	40.00
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C. H. Lehmers, Acct. I. O. U. tag.....	50.00
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Con Roman, Acct. I. O. U. tag.....	50.00
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L. A. Blasingame.....	44.45
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James Lawrence Acct. Note (?).....	20.00
------------------------------------	------------------

	\$23,852.63
--	-------------

Merchants' Exchange.....	500.00
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Buggy.....	300.00
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Cash in Business.....
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"At my death all the above property and any other property that may be found to belong to me is to go to my wife

and to her alone, and I omit intentionally all other members of my family.
S. W. CLISBY."

The only facts alleged in the appellant's petition as grounds for revoking the probate are in effect that one of the numbers appearing in the document was altered, all of the numbers then erased, and the last paragraph written, on a day subsequent to the writing of the first part of the will; but all of this, it is alleged, was done by Clisby himself. A demurrer to the petition was interposed, and sustained, without leave to amend; and thereupon the judgment or order appealed from was entered.

Upon the facts stated—which are confessed by the demurrer—it is claimed by the appellant: 1. That on the face of the document it appears not to have been dated; and 2. That the concluding paragraph was written on a subsequent day.

⁴⁰⁰ In support of the former proposition it is urged, "that the words and figures 'October 1, 1902,' were not intended by the testator to express the date of the instrument, but merely the date upon which he was the owner of the specified property." But this contention is untenable. There is indeed a certain ambiguity in the instrument. For grammatically, the date used may be regarded either as the date of the memorandum or as the date of the will. But the difference is immaterial. For, on the former construction, the memorandum being part of the will, its date would be the date of the will also. Nor do we doubt the right of the testator to adopt as the date of his will the date previously written by him.

Nor is the case affected by the fact alleged, that the concluding part of the will was not written on the day the will was commenced. It is a very common thing for men to commence a letter or other document on one day and to finish it on the next or some subsequent day; and in such case the date, whether written at the beginning—as is usually the case—or at the end—as is sometimes done—is, according to the common and received usage of language, the proper date of the writing; and this is equally true of legal documents, though these do not take effect until completed and delivered. We do not doubt, therefore, that the case comes within the meaning and intention of the enactments concerning holographic wills (Civ. Code, secs. 1276, 1277; Code Civ. Proc., sec. 1309), which, it is provided, are to be construed according to "the approved usage of the language": Civ. Code, sec. 13; Estate of Fay, 145 Cal. 82, ante, p. 17, 78 Pac. 340.

In the argument on this point, it is assumed by the appellant's counsel that it appears from the allegations of the petition that the memorandum of property was written by the testator on the date given with "no thought of making a will"; and, in effect, that the intention of using it as part of a will was an afterthought. But this—assuming it to be material—is not alleged. All that is alleged is simply that the writing of the concluding part of the will was on a day subsequent to its commencement. Nor is there anything in the petition to indicate that the document probated as a will was not in intention "one continuous instrument": *Estate of Taylor*, 126 Cal. 98, 99, 58 Pac. 454. Whether, were it otherwise the ⁴¹⁰ fact would be material is another question, which, as in the case cited, we leave undetermined.

Respondent's counsel are also in error in supposing that "it did not appear in the *Skerrett Case*, 67 Cal. 585, 8 Pac. 181, that the letter annexed to the deed was written at a date other than the date when the deed was made." The contrary appeared from the records before the court. The deed was dated "April 26, 1881," and was acknowledged April 27th, and the letter, as appears from its recitals was written subsequently.

We advise that the judgment appealed from be affirmed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Angellotti, J., Shaw, J.

Van Dyke, J., concurred in the judgment.

Hearing in Bank denied.

Holographic Wills are discussed in the monographic note to *Estate of Fay*, ante, pp. 22-34.

BELL v. PLEASANT.

[145 Cal. 410, 78 Pac. 957.]

DEEDS—Burden of Proof as Between Prior and Subsequent Grantees.—Where a grantor, after having executed a conveyance of property which remains unrecorded, subsequently conveys it to another, the latter must, though his conveyance is first recorded, assume the burden of proving that his purchase was made and the purchase price paid in good faith and without notice of the rights of the previous grantee. (p. 62.)

EVIDENCE—Burden of Proof, When not Changed by Unnecessary Allegations in the Complaint.—The plaintiff is obligated to prove only the facts necessary to his cause of action. If he alleges some fact not necessary thereto, but which is in effect a traverse of some fact which might have been alleged as a defense to the action, and the defendant denies such allegation, this does not change the burden of proof, nor require the plaintiff to introduce any evidence on that subject until the defendant has produced evidence thereon which makes a rebuttal necessary. (p. 66.)

EVIDENCE—Burden of Proof, When not Changed by Pre-existing Trust Deed.—Where the contest is between persons claiming under different deeds from the same grantor, the second of which is first recorded, it is not material that the technical legal title was, before either conveyance was made, vested in trustees to secure certain indebtedness of the grantor. (p. 66.)

EVIDENCE—Declarations of a Former Owner of Property.—Where it is claimed that a conveyance absolute on its face was intended as a mortgage, declarations of the grantor at the time it was made and subsequently are admissible for the purpose of rebutting this claim. (p. 67.)

COSTS OF TRANSCRIBING TESTIMONY.—Where a court orders that a transcript of the testimony be made, the expense to be borne equally by the parties, the one who afterward recovers judgment is entitled to an allowance as costs of the share paid by him. (p. 67.)

T. J. Butts and T. Z. Blakeman, for the appellant.

Edmund Tauszky and Wallace A. Wise, for Lucius Solomons, Harry Block, Benjamin Harris and Leo Block, respondents.

Black & Leaming, for assignee of Mary E. Pleasant, an insolvent debtor, respondent.

412 SHAW, J. This is an action by the plaintiff against the defendants to cancel a deed executed by the defendant Mary E. Pleasant, to the defendant, Solomons, on February 4, 1897, and certain other deeds thereafter executed by the defendant Solomons and his successors whereby the title acquired by Solomons was vested in the defendant, Leo Block. The defendants appeared and answered and after trial findings were made in

favor of the defendants and judgment was entered accordingly. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

The complaint in substance alleges that prior to September 27, 1891, the defendant, Mary E. Pleasant, held the legal title to the property as trustee for the use and benefit of the plaintiff; that on that day she executed a deed to the plaintiff conveying to her the property in question, but that said deed had never been recorded; that afterward, on February 4, 1897, with the intention to cheat and defraud the plaintiff, the said Mary E. Pleasant executed another deed purporting to convey the same property to the defendant Solomons, which deed was duly recorded, and that subsequently by mesne conveyances, the title acquired by Solomons under said deed became vested in the defendant, Leo Block. It is further alleged that the defendant Solomons and each of his successors, including the defendant, Leo Block, took their respective deeds with knowledge of the fact that the land was the property of plaintiff. The court found that Solomons and each of his grantees took their respective conveyances without any notice, knowledge or information whatever, as to the claim, right title or interest of the plaintiff. It is contended by the plaintiff that this finding is not supported by the evidence.

It is not seriously contended by the defendants that there is any affirmative evidence to the effect that they, or either of them, received their respective deeds without notice of the rights of the plaintiff, and upon an examination of the evidence we find nothing in support of such finding. The claim of the defendants is, that the burden of proof to show notice ⁴¹³ of plaintiff's right on the part of Solomons and his successive grantees rests on the plaintiff, and that, in the absence of evidence on the subject, the court necessarily made the finding that they took without such notice. In this we think the defendants are mistaken and the court erred. It has been repeatedly decided by this court that where one holding under an unrecorded deed brings an action involving the respective titles to the land against a subsequent grantee under a deed which is first recorded, the first grantee will prevail, unless the second grantee not only shows the making and recording of his deed, but also that he made his purchase and paid the price in good faith, and without knowledge of the rights of the previous grantee. The question depends on the effect of the rule embodied in sections 1214 and 1217 of the Civil Code, which are follows: "1214. Every conveyance of real property, other

than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action. . . .

1217. An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." The first case on the subject is *Long v. Dollarhide*, 24 Cal. 218, which was decided before the enactment of the code. It is there held that where a subsequent buyer whose deed is recorded claims title against a previous grantee under an unrecorded deed, the burden is upon the subsequent buyer to prove that he "is a purchaser in good faith and for a valuable consideration." The rule was laid down thus in *Eversdon v. Mayhew*, 65 Cal. 167, 3 Pac. 644: "To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment." The same doctrine has been approved and followed by this court in the following cases: *Landers v. Bolton*, 26 Cal. 419; *Isenhoot v. Chamberlain*, 59 Cal. 639; *Wilhoit v. Lyons*, 98 Cal. 413, 33 Pac. 325; *County Bank of San Luis Obispo v. Fox*, 119 Cal. 64, 51 Pac. 11; *Beattie v. Crewdson*, 124 Cal. 579, 57 Pac. 463; *Alcorn v. Buschke*, 133 Cal. 658, 66 Pac. 15; *Kenniff v. Caulfield*, 140 Cal. 45, 73 Pac. 803; *California C. F. Assn. v. Stelling*, 141 Cal. 719, 75 Pac. 320. It also prevails in the United States courts: *Boone v. Chiles*, 35 U. S. (10 Pet.) 211, 9 L. ed. 388. In view of these numerous decisions it must be conceded that the rule contended for by the plaintiff is firmly established, notwithstanding one or two cases which seem to state the opposite rule. In *Fair v. Stevenot*, 29 Cal. 487, the opinion seems to be written upon the assumption that the burden in such cases was on the claimant under the prior unrecorded deed to show notice of his right to the second grantee, but there is nothing in the decision upon that exact point, and it cannot be taken as a statement of the doctrine. In *Smith v. Yule*, 31 Cal. 184, 89 Am. Dec. 167, it is said that notice, either actual or constructive, to the second grantee must be clearly shown before the claimant under an unrecorded deed can prevail against a subsequent grantee for a valuable consideration. The ground of this position, as stated, is, that if a second grantee, knowing of the previous conveyance, should nevertheless purchase the

property and attempt to assert title thereto such conduct would constitute fraud on his part, and that the case comes under the rule that fraud is never presumed, but must always be proven. This is the only case which states the rule contrary to the numerous decisions above cited, and it must be considered as overruled. There is a line of cases which the defendants contend establish a contrary rule, but upon examination it will be seen that there is a clear distinction between them and the case at bar. Thus it has been invariably held that in a suit by a beneficiary to enforce a resulting or constructive trust against a grantee of the trustee, in cases where the trustee held under a deed purporting to convey the legal title, without terms indicating the trust, it was incumbent upon plaintiff not only to prove the facts establishing a trust, but also to prove that the grantee of the trustee took his conveyance with notice of the equities of the plaintiff. In *Wyrick v. Weck*, 68 Cal. 8, 8 Pac. 522, which was a case of this character, the court said: "It is said that the defense of a bona fide purchaser without notice is in the nature of new matter, the burden of proving which is upon the defendant. Ordinarily this is so." And the court proceeds to show that in that particular kind of cases the rule is different. The same ⁴¹⁵ proposition is stated and the distinction noted in *Tillaux v. Tillaux*, 115 Cal. 674, 47 Pac. 691, and in *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166. This principle is also applied in cases of suits by a purchaser under a judgment and execution sale against a grantee of the judgment debtor, where the plaintiff claims that the conveyance by the debtor to the grantee was fraudulent and void as against creditors: *Casey v. Leggett*, 125 Cal. 666, 58 Pac. 264. In such cases the burden is on the creditor to prove the fraudulent intent of the debtor in executing the deed. If thereupon the grantee proves that he paid a valuable consideration, the burden is then imposed on the creditor to prove notice of such fraudulent intent to the grantee at the time of his purchase, or before payment of the price. The underlying reason for this rule in these cases is, that as the debtor or trustee, as the case may be, holds the legal title at the time of the conveyance, the legal effect of his deed is to convey that title to his grantee, and thus there is established a legal condition which inures to the benefit of the grantee and cannot be changed in equity, except by proof of circumstances to show a superior equity in the party who disputes it. Equity follows the law, and a legal condition or status being once established, the burden of proof of facts neces-

any in equity to change the status is upon him who asserts the equitable right. A similar proposition was involved in Garber v. Gianella, 98 Cal. 527, 33 Pac. 458, and the same rule was applied. In Wyrick v. Week, 68 Cal. 8, 8 Pac. 522, it is said: "If there were matters in pais tending to show notice of plaintiff's rights at the time of such purchase . . . it was necessary for the plaintiff to make the proofs; for without such proof the title must remain where plaintiffs have alleged it to be—in defendants." And in Casey v. Leggett, 125 Cal. 666, 58 Pac. 264, it was said concerning the deed by the debtor to his grantee, "the deed having been made for a valuable consideration and delivered to the grantee, the law presumes that the grantee rightfully acquired a title to the property." In the case at bar and other similar cases, however, the conditions are precisely the reverse and the principle operates against the defendant. A subsequent deed by the grantor to another person does not of its own force convey any title, for the grantor, having previously parted with his title, has left in himself nothing to convey and his deed alone can therefore convey ⁴¹⁶ nothing. It can only be effective, as against the first grantee, when supplemented by proof that it was first recorded, and that the grantee therein named purchased for value and without notice of the prior deed, or of the rights of the first grantee. This, also, is an attempt to change a legal condition; the necessary facts cannot be presumed in favor of the second grantee, and hence the burden is on him to make the supplementary proof. The case of Hart v. Church, 126 Cal. 480, 77 Am. St. Rep. 195, 58 Pac. 910, is cited by the defendants in support of their contention on this point. In that case it was held that a purchaser of a negotiable instrument, having shown that he bought it for a valuable consideration before maturity, the plaintiff, in an action against him to cancel the note on account of fraud in procuring its execution, must prove that the purchaser, at the time he bought, had notice of the fraud. The same proposition is decided in Jordan v. Grover, 99 Cal. 194, 33 Pac. 889, Eames v. Crosier, 101 Cal. 263, 35 Pac. 873, and Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024. These cases, however, manifestly rest upon the same ground as Casey v. Leggett, 125 Cal. 666, 58 Pac. 264, Wyrick v. Week, 68 Cal. 8, 8 Pac. 522, and similar cases above cited. The indorsement carries the legal title to the note and vests it in the indorsee, and if it is shown by him that he bought for a valuable consideration before maturity, his legal title cannot be divested nor his right to recover defeated, without the proof which

shows his purchase to have been fraudulent—namely, that he had notice of the lack of consideration or of the fraud, or other defense of the maker. They, in fact, apply the same principle as the many decisions above cited holding that in a suit between a prior grantee under an unrecorded deed and a second grantee whose deed is first recorded the burden is upon the second grantee to prove that he purchased without notice of the other's rights and for a valuable consideration. It follows that, in the absence of any evidence on the subject, the finding should have been in favor of plaintiff on this point.

Defendants claim that plaintiff must prove that defendants had notice because it is one of the facts alleged in her complaint and denied in the answer. This, however, is not the test. The plaintiff was obliged to prove only those facts which were necessary to constitute her cause of action. If ⁴¹⁷ she has alleged some fact not necessary to her case, but which is in effect a traverse of some fact which might have been alleged in defense to her action, and the defendant denies such allegation, this does not change the burden of proof, nor require the plaintiff to introduce any evidence upon that subject, until the defendant has produced evidence thereon which makes rebuttal evidence on her part necessary. She is not obliged thus to anticipate a possible defense.

The court found that at the time of the execution of the deed by Mary E. Pleasant to Solomons the plaintiff was the owner of the property. Hence the further finding that the deed to Solomons and his deed to his successors in interest were executed for a valuable consideration was not alone sufficient to defeat the title of the plaintiff and authorize a judgment for the defendants. It required the aid of the other finding, that Solomons or some one of the successive grantees under him took without notice of plaintiff's rights. As this latter finding is not sustained by the evidence, it follows that a new trial should have been granted.

We do not consider as important the facts which are undisputed that ever since the year 1883 the technical legal title to the premises has been vested in certain trustees to secure an outstanding debt of fifteen thousand dollars to the Savings and Loan Society, and that this trust has been kept in force by renewals from time to time. Since 1891 the plaintiff has been the owner of the property subject to the trust, and the rules we have been considering are as much applicable to her estate therein as they would be if the trust deed had not existed. None of the defendants claim any rights under the

trust, but all rights of both plaintiff and defendants are alike subject thereto.

The plaintiff asserts that the court erred in admitting in evidence certain declarations of Mary E. Pleasant to the plaintiff at and subsequent to the execution of the deed from Pleasant to Solomons. The plaintiff's point is, that at the time the plaintiff was the owner of the property in controversy Mary E. Pleasant occupied the position of a previous owner, and that the declarations of a previous owner affecting title to the property, made after such owner has parted with the title, and not in the presence of the grantee, are not admissible against a grantee. There can be no dispute concerning ⁴¹⁹ the correctness of this rule, but we do not think it is applicable in this particular instance. The defendants claimed title as innocent purchasers for a valuable consideration under a subsequent deed from the plaintiff's grantor. The plaintiff claimed that the deed from Mary E. Pleasant to Solomons, under which the defendants claimed, was in legal effect a mere mortgage to secure a debt, and hence that it did not convey any title whatever. The defendants were therefore required to meet both propositions; first they had a right to show that Solomons, or any of his successors, was a purchaser for a valuable consideration without notice of the plaintiff's rights; and, secondly, they had to meet the contention that the deed under which they claimed did not convey the legal title, but was in effect a mortgage. On the latter proposition it was competent to show the declarations made by Mary E. Pleasant at the time of the transaction and subsequent thereto with respect to that particular question. As we understand the record, these declarations were admitted solely for that purpose.

Plaintiff further alleges that the court erred in denying her motion to strike from the cost bill the item of one hundred and twenty-two dollars and fifty cents for one-half of the cost of transcribing the testimony. The item was properly allowed. Before the transcript was written up the court made an order that it should be done, the expense to be borne equally by both sides. Upon the making of this order, the prevailing party, having paid one-half of the cost of writing up the testimony, was entitled to have it included in the cost bill and allowed as part of the costs of the case: *Barkly v. Copeland*, 86 Cal. 493, 25 Pac. 3. If the judgment and order had been affirmed upon this appeal, this item of cost would remain as a part of the costs properly chargeable against the plaintiff. It is necessary, however, to reverse the order denying a motion for a

new trial, and the effect is, that this item of costs is again set at large to be determined by the court upon a subsequent trial of the case.

The judgment and order are reversed and the cause remanded for a new trial.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

There are Many Authorities holding that one claiming title to land by a deed purporting to be made for a valuable consideration is presumed to be a purchaser in good faith without notice of prior unrecorded deeds, and that the burden of proof to show notice and want of good faith is on the party attacking the deed: See the note to *Anthony v. Wheeler*, 17 Am. St. Rep. 288; *Snyder v. Grandstaff*, 96 Va. 473, 70 Am. St. Rep. 863. Other authorities take a different view: See *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29; *Lake v. Hancock*, 38 Fla. 53, 56 Am. St. Rep. 159. See, also, *Parrish v. Mahany*, 12 S. Dak. 278, 76 Am. St. Rep. 604; *Booker v. Booker*, 208 Ill. 529, 100 Am. St. Rep. 250. According to *Block etc. Iron Co. v. Holcomb etc. Iron Co.*, 105 Iowa, 624, 67 Am. St. Rep. 319, the burden of proving that one is an innocent purchaser without notice of prior equities is on the purchaser, yet when a subsequent purchaser proves his purchase and payment for the land, the onus shifts to the person asserting the equity or encumbrance to show notice thereof to the purchaser.

HAGER v. ASTORG.

[145 Cal. 548, 79 Pac. 68.]

FORECLOSURE OF MORTGAGE—Known Grantee Under Unrecorded Deed Need not be Made a Party.—If the mortgagor conveys the mortgaged premises to one who does not place his conveyance on record, he need not be made a party defendant to a suit to foreclose, though the mortgagee has actual knowledge of the conveyance, if the statute of the state declares that no person holding a conveyance from or under the mortgagor which does not appear of record need be made a party to the action, and the judgment therein rendered and the proceedings therein had are as conclusive against a party holding such unrecorded conveyance as if he had been made a party to the action. (p. 70.)

FORECLOSURE, Beneficiary Under a Trust Deed.—If, at the time a mortgage is executed, the mortgagor holds the property in trust for another, the latter need not be made a party defendant to the suit to foreclose if, before its commencement, such trust has terminated, though in the meantime he has become the holder of the legal title under an unrecorded conveyance. (p. 71.)

FORECLOSURE, Questions Settled by.—In an action of ejectment where the plaintiff's title is based on a sale under a decree foreclosing a mortgage, the defense cannot be made on behalf of a

grantee of the mortgagor under an unrecorded conveyance that the suit was prematurely brought, because the note sued on was not due, that there was a question respecting the amount of interest due, and that the mortgagee had agreed to release the mortgagor from his liability on the note. (p. 71.)

JUDICIAL SALE—Omission of Seal from Order.—If an order of sale is properly signed by the clerk of the court and contains a complete copy of the decree of foreclosure, duly certified by the clerk, with his signature and the seal of the court attached, it is not material that the seal of the court was omitted from the order of sale. (p. 72.)

T. J. Sheridan and George D. Shadburne, for the appellant.

H. V. Keeling and Harry H. Reid, for the respondent.

549 **LORIGAN, J.** This is an action in ejectment to recover a tract of land in Lake county to which plaintiff obtained a sheriff's deed under a sale upon foreclosure of a mortgage, executed to her by the defendant, M. Astorg.

Judgment was entered in favor of plaintiff against all the defendants, but the defendant, A. Astorg, alone appeals, and does so both from the judgment and an order denying his motion for a new trial.

The main point on this appeal arises under the following facts: On April 27, 1898, the defendant, M. Astorg, executed the mortgage above referred to, to the plaintiff, who immediately had it recorded; subsequent to such recordation, and on June 2, 1898, said M. Astorg deeded the mortgaged premises to the appellant, A. Astorg; on January 12, 1900, the plaintiff commenced an action to foreclose the mortgage, making of these parties M. Astorg alone a defendant; when the foreclosure proceedings were commenced, the conveyance from M. Astorg to A. Astorg had not been recorded, and was not recorded until after the decree of foreclosure had been entered. Appellant set up these facts in his answer, and further averred that plaintiff, at the time she commenced her action of foreclosure, knew that the conveyance of the premises had been made by M. Astorg to him, and that he was then sole owner, but that she failed to make him a party defendant in the foreclosure proceedings.

Upon the trial appellant sought to make proof of this knowledge of plaintiff of the existence of the conveyance to him when she filed her complaint to foreclose, but on objection of the respondent the court decided that this evidence was inadmissible, and whether the ruling of the court was correct or not is the important question to be now determined.

The lower court was undoubtedly of the opinion that, as the conveyance to the appellant was not recorded when the foreclosure proceedings were commenced, it was immaterial whether plaintiff had actual knowledge of its existence or not; that she was required to make those persons defendants only whose conveyances appeared of record at the time she instituted ⁵⁵⁰ her foreclosure suit. We are satisfied that this view was correct under the code and the authorities.

It is provided by section 726 of the Code of Civil Procedure that, "No person holding a conveyance from or under the mortgagor of the property mortgaged, . . . which conveyance . . . does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance . . . as if he had been a party to the action."

The language of this section is not open to construction. It plainly declares that it is unnecessary to make any person a party to an action of foreclosure whose conveyance from the mortgagor, subsequent to the mortgage, is unrecorded at the time the action is commenced, while, at the same time, it binds such person by the decree in the action as conclusively as though he had in fact been made a party to the suit. The element of actual knowledge of the existence of such conveyance, in the absence of its recordation, is not within the terms of the section. The presence or absence of the subsequent conveyance upon the record in the proper office when the action is commenced is the exclusive test as to whether the holder thereof need or need not be made a party defendant, so as to bind him by the foreclosure decree. This is the only test in foreclosure proceedings which the law furnishes, and, under the section above quoted, it is not necessary to make such holder of an unrecorded conveyance a party defendant, even though the mortgagor may have actual knowledge of the existence of such conveyance when the foreclosure suit is commenced. He need only look to the appropriate records, and make parties to the action those alone whose subsequent conveyances appear thereon.

This section, above quoted, was under consideration in the case of *Aldrich v. Stephens*, 49 Cal. 678, and this was the view there taken of the meaning of its provisions, and that decision has since remained undisturbed: See, also, *Hawes on Parties to Actions*, sec. 7.

It necessarily follows from these considerations that the court properly excluded all evidence attempted to be offered as to knowledge upon the part of plaintiff, when she brought ⁵⁵¹ her action to foreclose, of the existence of the unrecorded subsequent conveyance to appellant.

Appellant further averred in his answer that at the time the mortgage was made by M. Astorg the plaintiff knew, and that it was the fact, that the said M. Astorg held the legal title to the premises in trust for appellant, and he sought on the trial to prove these facts under a contention that as beneficiary under the trust and as the real party in interest, it was necessary for the plaintiff to make him a party defendant in the foreclosure suit, in order to bind him by the decree, and complains, on this appeal, because he was not permitted to introduce evidence to show these facts. Without discussing the legal aspect of this proposition, it is sufficient to say that other averments in appellant's answer show that the trust he claimed existed had been terminated almost two years before the foreclosure suit was begun, by a conveyance from the trustee, M. Astorg, to himself of such legal title, so that, when the suit to foreclose was commenced, appellant was not a beneficiary under any trust, but was the holder of a legal title by an unrecorded conveyance thereof, and for that reason, as far as the necessity for making him a party, came within the provisions of section 726 above cited.

Additional points are made by appellant in his brief concerning the action of the lower court in precluding him from proving other alleged defenses, by sustaining objections of respondent to inquiries directed to that end. These defenses were that the foreclosure suit had been prematurely brought, because the note sued on was not then due; also involving some question as to the amount of interest due at that time, and a claim that plaintiff had agreed to release M. Astorg from all liability on the note and under the mortgage, and to hold the appellant solely responsible therefor. But these were all matters which were involved in the foreclosure suit—who was liable upon the note, and in what amount, and whether the note was due so as to authorize the foreclosure of the mortgage given to secure its payment—and these matters were necessarily adjudicated by the decree of foreclosure, and hence were not thereafter open to question by the appellant, who, by the section of the Code of Civil Procedure above cited, was conclusively bound by that decree.

There is but one further point in the case requiring consideration. ⁵⁵² In proving her title to the premises in dispute, the plaintiff introduced in evidence the judgment-roll in the foreclosure proceedings, together with the order of sale return thereon, and the sheriff's deed of the land. The order of sale, while properly signed by the clerk, did not have attached to it the seal of the court, and appellant objected to its introduction in evidence on that account. The court admitted it, and this is assigned as error. It appears that this order of sale, properly signed by the clerk, but without the seal of the court attached, was delivered to the sheriff, and under it the sale was made. The order itself contained a complete copy of the decree of foreclosure, duly certified to by the clerk, with his signature and the seal of the court attached.

The direction in the order of sale itself, in the case at bar, which is not attacked save for want of a seal, consists of a direction to the sheriff to sell the property as provided by law, apply the proceeds of the sale to the satisfaction of the judgment, and to do all things according to the terms and requirements of the judgment and the provisions of the statute. But all these directions are equally provided for in the certified copy of the decree itself which is incorporated in the order of sale, so that the recitals in the order aside from the decree amount to nothing more than a reiteration of the provisions of that decree.

The contention of the appellant, as we gather it (because he makes this point by way of addenda to his brief with a reference to some authorities, but without discussing the matter), is, that the validity of this order of sale is to be governed by the requirements of section 682 of the Code of Civil Procedure relative to writs of execution. That section provides that such writs shall, among other things, be sealed with the seal of the court. Appellant contends that the failure to place the seal of the court on the order of sale rendered it void, and as bearing upon this point he cites from the decisions of this court the case of *O'Donnell v. Merguire*, 131 Cal. 527, 82 Am. St. Rep. 389, 63 Pac. 847. But that case did not involve the question of the absence of a seal, but the failure of the clerk to authenticate the writ with his official signature, which failure, it was held, rendered the execution void.

Whether the absence of a seal would have the like effect ⁵⁵³ upon the validity of a writ of execution, as the failure of the clerk to attach his official signature thereto, we are not called on to determine, because we are satisfied that, as far as its ab-

since from an order of sale is concerned, it would only render the process erroneous. Aside from this, it may well be questioned whether the power of the sheriff to sell under a foreclosure decree is to be tested by the same rule which governs his power under a writ of execution issued upon a money judgment, as was the case in *O'Donnell v. Merguire*, as appears from a recital of the facts in *Merguire v. O'Donnell*, 139 Cal. 7, 96 Am. St. Rep. 91, 72 Pac. 337. Upon a money judgment it is, of course, clear that there can be nothing in the terms of the judgment authorizing a sale of property to satisfy it, and the only authority which the sheriff can obtain to do so must be by virtue of a valid writ of execution issued by the clerk and placed in his hands for that purpose. His authority to sell can be derived solely under the writ. His authority to sell under a foreclosure proceeding is, however, derived from the decree, and the specific directions to sell which it contains.

As was said in *Spaulding v. Howard*, 121 Cal. 197, 53 Pac. 564, in discussing this subject: "The sheriff, under the Code of Civil Procedure, proceeds with the sale by virtue of the decree and such direction as the court may give: Code Civ. Proc., sec. 726. The proceedings follow by analogy sales upon execution but not necessarily so. The power to sell comes from the statute and the decree."

But, be this as it may, we are satisfied that, as to an order of sale issued under a decree of foreclosure, the omission of the seal of the court therefrom renders the process erroneous merely and this view is supported by the case of *Newmark v. Chapman*, 53 Cal. 559. In that case, the only process under which the sheriff made the sale was a certified copy of the decree of foreclosure, and, hence, there was involved in that case a more serious question as to the validity of the sale than is presented here. In the case cited there was no order of sale at all; in the case at bar there was a defective one. In *Newmark v. Chapman*, 53 Cal. 559, the court, while holding that the process under which the sale was made, though erroneous, was not void, said: "The process under which the mortgaged property was sold was only a copy of the judgment issued and attested by ⁵⁵⁴ the clerk. It did not conform to sections 682 and 684 of the Code of Civil Procedure, as it did not purport to have been issued in the name of the people, nor was it directed to the sheriff, nor did it direct him to execute the judgment. . . . The process was erroneous; but was it, for the defects above mentioned, void? The judgment itself directed the sheriff to do all that process, issued in the most formal and

regular manner, could have directed him to do. If the process was amendable by supplying the above-mentioned defects, it was not void; for void process cannot be amended, and if it was amendable, it will be treated, in this proceeding, as having been amended—that is to say, it cannot be attacked collaterally.”

If, then, in the case cited, the process under which the sale was made, consisting solely of a certified copy of the decree, was erroneous merely as the court there held, in the case at bar there is less ground upon which to base a claim that the process here involved was void, because not only was this sale made under a certified copy of the decree of foreclosure, but also under an order of sale, which, at most, was defective in matter of form.

We are satisfied from an application of the above authority, alone, that the process under which the sale in question here was made was not void, but merely erroneous, and that, as to the appellant, who was bound by the decree in the foreclosure suit, as declared by section 726 of the Code of Civil Procedure, and who is now in this proceeding collaterally attacking the sale made under it, the process under which sale was had was sufficient authority to the sheriff to sell and convey the premises mortgaged.

The judgment and order appealed from are affirmed.

McFarland, J., and Henshaw, J., concurred.

That the Grantee of a Mortgage is a necessary party to foreclosure proceedings, see Berlack v. Halle, 22 Fla. 236, 1 Am. St. Rep. 185. One who has purchased a part of mortgaged premises and recorded his deed must be made a party to a subsequent suit of foreclosure: Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108.

On the Effect of a Judicial Sale not under the seal of the court, see Gordon v. Bodwell, 59 Kan. 51, 68 Am. St. Rep. 341; Weaver v. Peasley, 163 Ill. 251, 54 Am. St. Rep. 469; Evans v. Johnson, 39 W. Va. 299, 45 Am. St. Rep. 912; Stonffer v. Harlan, 68 Kan. 135, post, p. 396.

BAILLARGE v. CLARK.

[145 Cal. 589, 79 Pac. 268.]

ESTOPPEL to Urge that a Conveyance was not Delivered.—If a Wife signs and acknowledges a conveyance to her husband, who wrongfully takes it from her trunk and places it on record, and she, knowing of this fact, delays for three years to give any notice of her claim, during which time the property is purchased for the benefit of a railway company which enters into possession and makes improvements without notice of any defect or want of delivery of the deed, she is estopped from maintaining an action to quiet her title on the ground that her deed was never delivered. (p. 79.)

Adcock & Rymert, for the appellant.

John D. Pope, for the respondent.

590 VAN DYKE, J. This is an appeal from a judgment entered in favor of the defendant upon the judgment-roll. The action is to quiet title to a strip of land described as lots numbers 501 55 and 56 in block Q of the Santa Monica Commercial Company tract, in the town of Santa Monica.

The court below found that the plaintiff and Maurice Baillarge were husband and wife at the time the said Santa Monica Commercial Company conveyed the premises in dispute to the plaintiff as her separate estate, in 1893.

On August 7, 1897, the plaintiff and her husband went before a notary public in Santa Monica to draw their wills, when, upon representations of the notary in reference to the expense of probating a will, they concluded to have mutual deeds executed, one to the other, of the tract of land including the premises in controversy. Thereupon deeds in the form of grant, bargain and sale, for a nominal consideration, were prepared and executed, the one to the other. After said deeds were signed and acknowledged, the one in which the plaintiff was grantee was handed to her by the notary, and she thereupon gave the notary the deed and directed him to place the same on record, and the deed executed by plaintiff to her husband, after being acknowledged, was by the notary thereupon immediately handed back to the plaintiff. Two days thereafter, on August 9th, plaintiff departed from Los Angeles county, and went to the Dominion of Canada. Prior to her departure she had packed two trunks, in one of which she had placed the deed from herself to her said husband, together with articles of wearing apparel, and gave said trunks to her husband to be checked

as baggage, but on account of excess in weight he checked only one of said trunks, leaving the one in which said deed had been placed. And during the time that the plaintiff was on a visit to Canada, Maurice Baillarge, without her knowledge or consent, took the deed of plaintiff to him from the trunk, and, claiming to be the owner of the property therein described, on September 9, 1898, for a valuable consideration, conveyed the property mentioned in the complaint to one W. F. Nordholt; that thereupon said Nordholt filed said deed so executed to himself, and also the deed from the plaintiff to his grantor, Maurice Baillarge (which had not prior thereto been recorded), for record in the county of Los Angeles. The said Nordholt did not search the records or cause the records of said county to be searched, and made the purchase solely upon the representation of said Maurice Baillarge that he was the owner of said property. Thereafter, ⁵⁹² on October 26, 1898, Nordholt sold and conveyed the premises in question by grant, bargain and sale deed to A. I. Smith, for the consideration of six hundred dollars, fifty dollars paid in cash, and a promissory note given for five hundred and fifty dollars, payable in six months after date. Said deed was recorded November 2, 1898, in the records of Los Angeles county. On December 2, 1898, said Smith conveyed said premises to E. P. Clark, the defendant, by grant, bargain and sale deed, the grantee therein paying Smith fifty dollars cash and agreeing to pay the note of Smith to Nordholt, which he subsequently did; that said deed was thereupon recorded December 5, 1898, in the records of Los Angeles county. The purchase of the premises in question was made by Smith and Clark, and the conveyance was taken by them for the benefit of the Los Angeles Pacific Railroad Company, of which company the defendant, Clark, is the principal manager and director, and said company immediately upon the execution of the deed to Smith entered into possession of the said premises, laid its track across the same, and afterward and for six months, continued to make improvements upon said premises in such manner as to use them for a place for repairing and cleaning cars. The said improvements were made at different times during the six months after taking possession of said premises, and aggregated in amount five hundred dollars.

Plaintiff paid the taxes upon the premises in dispute that were due and payable prior to the first Monday in March, 1899, and defendant paid the taxes on behalf of the Los Angeles Pacific Railroad Company thereafter.

"Plaintiff returned from her visit to Canada on the fifth day of November, 1898, and was informed on that day that Maurice Baillarge, her husband, had abstracted the deed from her to him from her said trunk and had conveyed the premises to Nordholt and that Nordholt had transferred the said premises to Smith, for the Los Angeles Pacific Railroad Company, and that the railroad company had entered into the possession thereof and laid its tracks thereon, and that the said railroad company was using the same as its property; and that no notice (except such notice, if any, as the above facts impart) was given by plaintiff to defendant or by defendant to plaintiff, or the Los Angeles Pacific Railroad Company, ⁵⁰³ or to anyone for them, or either or any of them, of their claim or rights in and to the property in dispute (except such knowledge and notice, if any as is given and imparted by the facts aforesaid) until the commencement of this action.

"Neither W. F. Nordholt nor A. I. Smith, nor defendant E. P. Clark, nor the Los Angeles Pacific Railroad Company, had any knowledge or notice until the commencement of this action (unless the facts in the previous findings stated impart notice) that plaintiff was the owner or claimed to own, or had any interest in the premises in dispute."

From these facts so found the court rendered judgment in favor of the defendant.

The contention on the part of the appellant is, that the deed from the plaintiff to her husband, Maurice Baillarge, was never delivered, and therefore never became operative as a conveyance. The respondent, on the other hand, replies that, admitting the deed was never delivered so as to take effect between the parties thereto, from the facts found by the court the plaintiff is estopped, and the judgment in favor of the defendant should be affirmed; and in this we think the respondent is correct.

It is found that Nordholt received the deed from the appellant's husband to the premises in dispute September 9, 1898, and conveyed the premises to Smith October 26, 1898, and that ten days thereafter appellant returned from Canada, and was then informed that the deed had been taken from her trunk, and that her husband had made the conveyance in question, and that nearly a month thereafter Smith conveyed to the defendant Clark, for the benefit of the railroad company, as stated, which company had entered into possession and commenced making improvements thereon, which continued six months thereafter and aggregated five hundred dollars; that

the plaintiff gave no notice whatever, nor made any indication of her claim to the property until the commencement of the action, nearly three years after her return from Canada, and after being informed of the whole transaction.

If the plaintiff did not approve of the transaction on the part of her husband, it was her duty, when informed of the same, to promptly repudiate what had been done by her husband in the premises. Instead, however, it appears that no notice whatever was given or steps taken to inform the defendant ⁵⁹⁴ that she disapproved of the transaction until the commencement of the action, nearly three years after becoming acquainted with all the facts.

It is laid down as one of the maxims of the law that "He who can and does not forbid that which is done on his behalf is deemed to have bidden it": Civ. Code, sec. 3519. In *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392, the appellant, in conjunction with her husband, signed and acknowledged a conveyance of her interest in the land in question to one Etchison, and sent such conveyance to her sister, with instructions to deliver it only upon the condition that he pay the amount of the purchase money in question. In violation of these instructions, however, the sister delivered the deed to the grantee named in it, without the payment of the purchase money. In that case, it was contended, on behalf of the plaintiff, that the deed, having been delivered in violation of the condition imposed by the said plaintiff, did not become effective. The court, after admitting to the full extent the abstract proposition as stated to be correct—that a deed delivered in escrow is not effective if placed in the hands of the grantee in violation of a condition upon which the person who holds in escrow is authorized to deliver it—however, decided the case against the appellant and in favor of the defendant, the purchaser from Etchison, on the ground of estoppel—to wit, that where one of two innocent persons must suffer he through whose agency the loss occurred must sustain it (citing a number of authorities to that effect).

In *Beardsley v. Clem*, 137 Cal. 328, 70 Pac. 175, the plaintiffs owned a tract of land near Redlands, and the defendants owned a tract near Downey, and exchanged deeds for the same on December 1, 1898, in pursuance of a verbal agreement previously entered into. On the night of November 30, 1898, a house which stood on defendants' land was destroyed by fire, and it was found that at the time the deeds were exchanged

the parties believed that the dwelling was on the land; that the existence of the dwelling-house was an inducement to the plaintiffs and a part of the consideration moving to them in the transaction, and that had plaintiffs known of the destruction of the house they would not have made the exchange. On December 19th plaintiffs served notice of a rescission and demanded a reconveyance, ⁵⁹⁵ but prior to that time and after the exchange of the deeds, defendants had placed permanent improvements on the land taken by them of the value of three hundred and fifty-nine dollars, and expended eighteen dollars for cultivating and irrigating said lands, and forty dollars paid to the plaintiffs' intestate and one of the parties who made the exchange, for fertilizing material left on the premises conveyed to the defendants. The court below held, that, although the plaintiffs had the right to rescind in view of the mutual mistake, they were yet estopped by subsequent conduct; that the acts and conduct of plaintiffs' intestate indicated that he did not intend to rescind, and rather encouraged the defendants in the work performed and expenditures made, adding, "These things created an equitable estoppel, because it is unconscionable for a party to permit another to so improve property obtained in such a bargain, and then claim the property and improvements, even were he to pay the costs of the improvements"; and this court, after citing a number of authorities bearing upon the question of estoppel, affirmed the judgment.

In *Alexander v. Welcker*, 141 Cal. 302, 74 Pac. 845, the note and mortgage sued on were executed by the defendant (appellant) and her husband (W. T. Welcker) in his lifetime—the title to the mortgaged premises being in the appellant alone. The court finds that after executing the mortgage with her husband she exacted a promise from him as to the delivery of the note and mortgage at the time she intrusted the same to him, but that he never at any time informed the mortgagees (under whom plaintiff claimed) of the promise he had made to defendant, and they had no notice or knowledge thereof. It was contended in that case by the appellant, as here, that there was no legal delivery of the mortgage to the mortgagees. This court, however, in the opinion affirming the judgment, says: "Under the circumstances the appellant is clearly estopped from denying the delivery of the mortgage."

The reasons for the application of the old rule of equitable estoppel are equally as cogent in the case at bar.

Judgment affirmed.

Beatty, C. J., Lorigan, J., Henshaw, J., Shaw, J., and Angellotti, J., concurred.

Rehearing denied.

Estoppel Against a Married Woman to assert title to real property is discussed in the monographic note to *Trimble v. State*, 57 Am. St. Rep. 170-175, and the recent case of *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959. It is held in *Hunt v. Reilly*, 24 R. I. 68, 96 Am. St. Rep. 707, that if a married woman, knowing of a deed purporting to contain a release of her dower, within three years after its execution, fails to notify the grantee in her supposed deed or any of his grantees that she did not sign such deed as appears of record, and permits them to suppose that such signature is genuine, she is not estopped as against them to set up the fact that her supposed deed was fraudulent. But see *Stacey v. Walter*, 125 Ala. 291, 32 Am. St. Rep. 235.

ALLEN v. STOWELL.

[145 Cal. 666, 79 Pac. 371.]

WATERS AND WATERCOURSES, Creating a Nuisance by Interfering With.—To Wrongfully Cause Water to Flow upon Another's Land which did not flow there naturally is to create a nuisance. (p. 82.)

INJUNCTION Though Damages are Nominal.—An injunction may issue against the continuance of an act though the damages due to it are nominal, if it is an invasion of another's right, as by wrongfully causing water to flow upon his land. (p. 83.)

THE PRINCIPLES upon Which Mandatory and Prohibitory Injunctions are Granted do not materially differ, though perhaps the courts are less inclined to grant the former than the latter. (p. 83.)

A MANDATORY INJUNCTION May Issue to Compel the Removal of a Dam which causes water to be diverted from its natural course and to flow on plaintiff's land, thereby destroying his trees and excavating deep gulches. (p. 83.)

WATERS AND WATERCOURSES—Constructing Dams, When not Justified Because of Defects in the Construction of a Railway.—One who enters upon his land and constructs dams which cause water to flow upon and injure the lands of another cannot justify his action on the ground that it was to correct the mistake of a railway company in locating its culvert. (p. 84.)

Frank Burnett, for the appellants.

James Burdett, for the respondent.

per CHIPMAN, C. Defendants appeal from a judgment for plaintiff granting a mandatory injunction compelling defend-

ants to remove certain dams erected by defendants which caused the flow of water to be diverted from its natural course onto plaintiff's land. The bill of exceptions does not pretend to bring up all the evidence, but, as stated in appellants' brief, "is intended only to present two questions of law adopted by the court and applied to the case." These questions are: 1. Will the remedy of mandatory injunction lie where the evidence is conflicting on the point at issue, unless there first be a verdict of a jury or decision of the court finding that actual—at least nominal—damages have been awarded plaintiff? 2. Did the court err in its ruling that defendants had no right to build the obstruction for the purpose of correcting a mistake of the railroad company in locating its culverts? It appears from the findings of the court that plaintiff's land is planted to orange trees in full bearing. Prior to the commencement of the action, and when defendants commenced the construction of the dams complained of, "plaintiff demanded of them that they desist and cease from said work and protested against the construction thereof, and explained to them the nature of the damages that said dams would cause him and his said lands and orchards, but defendants refused to abandon said work, or to cease the construction of said dams, and continued the same to completion." It appears from the bill of exceptions and is substantially found as the facts by the court also, that the evidence of plaintiff tended to show that the dams referred to, which were erected after the railroad company had built its track, were so constructed that "all water flowing down said ancient way . . . would be diverted by said dams from its natural course and caused to flow in one accumulated body southerly along the east of these dams through said railroad culverts and thence in a like body through the lands of S. A. Stowell to the northeasterly corner of plaintiff's land, and would then flow in said accumulated volume with great force southwesterly and diagonally across plaintiff's lands, the natural effect of which would be to destroy a great number of his trees growing upon said land, and to excavate deep gulches and watercourses diagonally through the same; that the construction of said dams would and did arrest and divert water and cause the same to flow upon the lands of plaintiff as last above found which would not naturally flow there in times of flood and high water"; and this the court found "would cause him [plaintiff] and his said land and orchard great and irreparable injury and damage."

There was a certain part of the dams and wing-dam erected

by defendants which the court "in the absence of results from actual experience" was unwilling to order removed on the evidence then before it, but found certain other portions to be a nuisance, "and should be removed and leveled to the original and natural surface of the ground."

Relief by injunction will be given to prevent a deprivation of ancient rights; and if it be shown that plaintiff's house is by the obstruction which he seeks to enjoin rendered in a substantial degree less fit for purposes of occupation than before, "equity may interfere, even to the extent of making its injunction mandatory by directing the restoration of matters to the condition in which they were before defendant's erection was begun": High on Injunction, sec. 860. A trespass irreparable in its character and of a continuing nature may be restrained by a mandatory injunction, thus restoring things to their original condition; health officers may be restrained by mandatory injunction from allowing a sewer to remain open: High on Injunction, sec. 708. Trespass upon public lands may be enjoined by the United States, and the injunction be made mandatory to compel the defendant to remove obstructions such as fences (High on Injunction, sec. 723a); and in a case of a nuisance to a dwelling-house, the injunction will be made mandatory if the circumstances of the case require it: High on Injunction, sec. 792.

It has been held that a bill to enjoin the erection of a nuisance in close proximity to plaintiff's buildings which contains allegations of irreparable injury to complainant is not demurrable because it fails to show that the rights of the parties have been settled at law: High on Injunction, sec. 791.

This court said in *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11, that the right to an injunction in a case like the present one "does not depend upon the extent of the damage measured by a money standard; the maxim 'De minimis,' etc. does not apply. The main object is to declare a nuisance and to prevent the continuance by a mandatory injunction." The court found that the waters, diverted upon plaintiff's land by the dam erected by defendant would not flow there if allowed to take their ^{own} natural course. To thus wrongfully cause water to flow upon another's land which would not flow there naturally is to create a nuisance per se. "It is an injury to the right, and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes": *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

Tr. Wood says: "Every such act is an invasion of another's

right, and is actionable because of the injury to the right, whether the damage be great or small. Indeed, the act is wrongful *per se* and in its inception, and is actionable without any special damage": Wood on Nuisance, sec. 376. See, also, sec. 782. An obvious distinction between injury and damage, *not always observed in dealing with the question before us, is clearly pointed out by Mr. Wood: Wood on Nuisance, sec. 783.* Speaking of a man's right of dominion over his property and the jealous care with which courts have guarded this sacred right, the author says: "Whatever invades this right is a *legal* injury, whether damage ensues or not. It is a *right*, for the violation of which the law 'imports damage to support it,' and courts of equity have *always* interposed, in a proper case, to protect the right, without any reference to the question of *actual* damage, the motive which instigated the party to invoke its aid, or the benefits that he derives from the act": Wood on Nuisance. (*Italics the author's.*)

The principles upon which mandatory and prohibitory injunctions are granted do not materially differ. The courts are perhaps more reluctant to interpose the mandatory writ, but in a proper case it is never denied. It was said in *Johnson v. Superior Court*, 65 Cal. 567, 4 Pac. 575: "The jurisdiction of the court to grant a preliminary injunction restraining the defendants from interfering with the flow of water pending the litigation cannot be doubted, and we cannot see that its jurisdiction is exceeded when it requires the removal of the means by which the diversion is made. The ultimate aim of the injunction is the undisturbed flow of the water. The objections to the removal of the means by which the diversion is made are no more cogent than the objections to preventing the diversion of the water itself." As the court has jurisdiction, the only question is, Has it properly exercised its jurisdiction? We need not pursue the subject further. On the showing made in the bill of exceptions it clearly appears that ~~ere~~ "the construction of said dams [by defendants] would and did arrest and divert water and cause the same to flow upon the lands of plaintiff as last above found, which would not naturally flow through in times of flood and high water"; and by the finding of the court, presumably on sufficient evidence, the effect of these dams in so diverting the water would be to "destroy a great number of his [plaintiff's] trees growing upon said lands, and would excavate deep gulches and watercourses diagonally through plaintiff's land," rendering a considerable portion of it and the orchards thereon useless,

and cause plaintiff and the said land irreparable injury. This was quite sufficient, in our opinion, to warrant the court in granting the relief given by the judgment: *Rudel v. Los Angeles County*, 118 Cal. 281, 50 Pac. 400.

The second point may be briefly disposed of. Whatever was the effect on plaintiff's land from any defective construction of the railroad company's roadway, or locations of its culverts, defendants cannot justify or defend their acts on the ground that they were endeavoring to obviate the mistakes of the railroad company and failed. Conceding their right to go on their own land for this purpose the fact remains, as found by the court, that it was defendants' dams that were the cause of the injury. The dams did not merely reinstate natural conditions; they created new conditions. What the court stated it would have held had the facts been otherwise is immaterial and presents no question now for review.

We advise that the judgment be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Van Dyke, J., Angellotti, J., Shaw, J.

The Overflowing of Land by means of a dam may be enjoined in a proper case: See *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265; *Carlson v. St. Louis River etc. Co.*, 73 Minn. 128, 72 Am. St. Rep. 610; note to *Mizell v. McGowan*, 85 Am. St. Rep. 711.

Injunctions against trespasses causing trivial injuries and nominal damages are discussed in the monographic note to *Moore v. Halliday*, 99 Am. St. Rep. 735-740.

MCGARRIGLE v. ROMAN CATHOLIC ORPHAN ASYLUM.

[145 Cal. 694, 79 Pac. 447.]

DEEDS, Omission of Operative Words from.—A conveyance from A to B of a tract of land to be held for life, followed by a clause stating that it is the purpose of A by the deed that, after the death of B, the lands shall become the property of D, does not vest any title in the latter. (pp. 85, 86.)

DEEDS.—A Conveyance Must Transfer a Present Interest in the property, or it can have no operation. (p. 86.)

D. C. Murphy, John L. Seawell and Frank J. Sullivan, for the appellant.

J. M. Thompson and C. H. Pond, for the respondent.

HENSHAW, J. This action was to quiet title to forty-two acres of land in the county of Sonoma. Cordelia Jones during her lifetime conveyed an estate in the land in question to the plaintiff, who was her nephew. Subsequently, she died, and in the probate of her estate this land was distributed to Catherine McGarrigle the mother of this plaintiff, subject to a life estate in plaintiff. Thereafter Catherine McGarrigle conveyed her fee to plaintiff, who instituted this action. Defendant claims by the deed above referred to from Cordelia Jones to the plaintiff, and the construction of that instrument is determinative of this case. It is in language as follows:

"This indenture, made this tenth day of February, in the year of our Lord one thousand eight hundred and ninety-nine, between Cordelia Jones of Sonoma county, state of California, the party of the first part, and Thomas McGarrigle of the same place, the party of the second part,

"Witnesseth, that the said party of the first part, for and in consideration of the sum of love and affection and one dollar money of the United States of America, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged has granted, bargained and sold, conveyed and confirmed, and by these presents does grant, bargain and sell, convey and confirm unto the said party of the second part, during his lifetime, all that certain lot, piece or parcel of land situate, lying and being in the township of Santa Rosa, county of Sonoma state of California, and bounded and particularly described as follows, to wit: [Here follows description.]

"It is the purpose of the party of the first part by this deed, that after the death of the said party of the second part, the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco, state of California."

It is upon the italicized portion of this conveyance that appellant relies, but we are of opinion that the trial court correctly construed this clause as containing no operative words **of** grant, and as failing to convey any present interest in the property. It will be noted that the appellant is nowhere mentioned as a grantee in the deed, and that the language of the clause is but an expression of the grantor's purpose in the future disposition of the property. It left in her a reversion after the life estate to Thomas McGarrigle, which required some future conveyance, or some testamentary disposition, to effectuate its transfer to the orphan asylum. But not only

was there a failure of operative words to convey to the asylum, but no present interest can be said to pass under the language which was employed. It is fundamental that, while possession or enjoyment of an estate may be deferred, a deed to be operative must pass a present interest. This was not done by the instrument in question. The express purpose was—giving to it its fullest effect—that the land should become the property of the orphan asylum after the death of McGarrigle, but should not become its property before. Such attempted dispositions have been uniformly held to be inoperative in deeds: *Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98; *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. 522; *Reed v. Hazelton*, 37 Kan. 321, 15 Pac. 177; *Sperber v. Balster*, 66 Ga. 317; *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Cunningham v. Davis*, 62 Misa. 366; *Donald v. Nesbitt*, 89 Ga. 290, 15 S. E. 367.

The judgment and order appealed from are therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

In Order to Constitute an Instrument a deed, it must pass a present interest in the property; but this may occur without the present enjoyment or possession passing: See the monographic note to *Wilson v. Carrico*, 49 Am. St. Rep. 219-222. A conveyance not to take effect until the death of the grantor is a testamentary instrument: *Wilson v. Wilson*, 158 Ill. 567, 49 Am. St. Rep. 176. On the distinction between deeds and wills, see the monographic note to *Ferris v. Neville*, 89 Am. St. Rep. 494-500.

HOLMES v. MARSHALL.

[145 Cal. 777, 79 Pac. 534.]

LIFE INSURANCE—Exemption of from Execution Against the Beneficiary.—Under a statute providing that moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums do not exceed five hundred dollars, are exempt from execution, they are exempt from execution or attachment against the beneficiary as well as against the person whose life was insured. (p. 89.)

LIFE INSURANCE, Exemption of from Execution.—Where a policy of life insurance is payable to the administrators of the insured, and being so paid, the proceeds are set aside to his widow by the court having the administration of his estate, they are exempt from execution for her debts. (p. 90.)

EXEMPTION—Proceeds of Life Insurance Deposited in Bank. Where the proceeds of a life insurance which are exempt from execution are deposited in bank by the beneficiary, the right of exemption is not thereby lost. (p. 92.)

ATTACHMENT—Setting Aside Levy on Exempt Property.—The court whence a writ of attachment issues may set aside a levy thereof made on exempt property. (p. 92.)

Powers & Holland, for the appellant.

Morton, Hauser & Jones, for the respondents.

THE COOPER, C. This action is upon a promissory note for one thousand dollars, dated October 5, 1899, signed by J. F. Jenkins and his wife, Annie J. Jenkins. J. F. Jenkins died intestate, and respondent Annie J. Jenkins is his surviving widow. After the action had been commenced a writ of attachment ⁷⁷⁸ was issued and levied upon one thousand and twenty dollars and fifty-seven cents on deposit in the Citizens' National Bank of Los Angeles to the credit of respondent, Annie J. Jenkins.

The court made an order after notice, and, on motion of respondents, setting aside the levy of said writ and dissolving it as to the money so on deposit with said bank. This appeal is from the order so made. The principal question is as to whether or not the said money was subject to the debts of respondent, Annie J. Jenkins, or exempt from execution against her. At the time of his death J. F. Jenkins was the owner and holder of three fully paid up life insurance policies upon his own life, two of which (one for ninety-nine dollars and one for thirteen hundred and eighty-five dollars) were payable to respondent, Annie J. Jenkins, and one of which (for nine hundred and eighty-two dollars and fifty cents) was payable to the estate of deceased, his administrators or executors. The estate of said deceased was duly probated, and the nine hundred and eighty-two dollars and fifty cents insurance collected, which constituted the entire estate, and of which there remained five hundred and thirty-nine dollars and forty-five cents after paying costs and expenses of administration. This was set apart to the surviving widow, Annie J. Jenkins, as exempt from execution under section 1465 of the Code of Civil Procedure. The proceeds of all said policies were deposited by respondent, Annie J. Jenkins, in one account to her credit in said Citizens' National Bank of Los Angeles. She drew against this account from time to time until the date of the levy of the attachment, when there remained the sum of one thousand

and twenty dollars and fifty-seven cents to her credit in said bank.

"All moneys, benefits, privileges or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars," are exempt from execution: Code Civ. Proc., sec. 690, subd. 18.

The main contention of appellant is, that the exemption extends only against the debts of the person whose life was insured and who paid the premiums requisite to procure the insurance and keep it in force, and that such exemption does not continue after his death in favor of the beneficiary. In construing this statute, as in the construction of all statutes, it is the duty of the court to arrive at the intent of the legislature, if it can be done, from the language used in the statute. Statutes exempting property from execution are enacted on the ground of public policy for the benevolent purpose of ⁷⁷⁰ saving debtors and their families from want by reason of misfortune or improvidence. The general rule now is to construe such statutes liberally, so as to carry out the intention of the legislature, and the humane purpose designed by the lawmakers: 12 Am. & Eng. Ency. of Law, 2d ed., pp. 75, 76, and cases cited; *In re McManus*, 87 Cal. 294, 22 Am. St. Rep. 250, and note, 25 Pac. 413, 10 L. R. A. 567; *Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653. Bearing this rule in mind, let us see what the legislature has said as to this matter. It has said that where the annual premiums do not exceed five hundred dollars, the insurance moneys shall be exempt from execution. Here the annual premium did not exceed five hundred dollars, It has said that all moneys accruing or in any manner growing out of any life insurance shall be exempt from execution. The money here accrued and grew out of life insurance upon the life of deceased. After his death, no execution could issue against him. The words "exempt from execution" were clearly intended to apply to the moneys coming from the life insurance to the hands of the beneficiary. It is exempt from execution as to all strangers or parties who have no claim to it without any provision of statute. It was intended to exempt it from the debts of the party to whom it was payable and who procured title to it by the death of the insured. It was not the intention that the insured might die leaving a small insurance and a dependent family and that the insurance money should be subject to execution for the debts the wife, even if she is the beneficiary named in the policy.

The words "exempt from execution" mean exempt from any execution. The legislature mentioned no class of executions, and we are not at liberty to judicially insert a class. "Exempt from execution" includes the defendant, Annie J. Jenkins, and applies to plaintiff. We have no decision of this court upon the question, and the decisions of other courts do not furnish much assistance, because the statute under which each decision was made is different from ours. In Kentucky and Minnesota the statutes declare in effect that certain insurance benefits, reliefs, etc., "shall be exempt from execution, and shall not be liable to be seized, taken or appropriated, by any legal or equitable process, to pay any debt or liability of a member." In both these states the fund or ⁷⁸⁰ relief is held to be exempt from execution, whether against the original member or against any beneficiary who has been paid or is entitled to be paid any benefit falling within the class described in the statute: *Schilling v. Boes*, 85 Ky. 357, 3 S. W. 427; *Brown v. Balfour*, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373; *First Nat. Bank v. How*, 65 Minn. 187, 67 N. W. 994. It seems, at least, doubtful as to whether or not these decisions properly construe the statutes of these states. The decisions in other states, particularly in New York, hold similar language to create an exemption only as to the member or insured.

In New York the language of the statute is, that such funds shall be exempt "from execution, and shall not be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt or liability of such deceased member": *Bolt v. Keyhoe*, 30 Hun, 619. The Kentucky and Minnesota cases are criticised by Freeman in his work on Executions (third edition, volume 2, section 234b), but the author says in speaking of the language of the statutes in those states: "If these statutes stopped with the words 'exempt from execution,' there would be no doubt of the exemption in favor of the beneficiary, but the additional words in the statute indicate that the legislature had in mind merely the debts or other liabilities of members of the association in question, and hence that, after the benefit was received by a person other than a member it would be subject to the usual laws relating to executions." In our code the statute stops with the words "exempt from execution." Under our statute necessary household and kitchen furniture is exempt from execution, and if the wife succeeds to such furniture it is equally exempt as to her debts. The farming utensils or implements of husbandry of the judgment debtor

are exempt, and if the son should take them under the will of his father, following his father's occupation, they would still be exempt as to the son's debts. Equally true as to the insurance money in controversy herein. If it had come to J. F. Jenkins in his lifetime, it is conceded that it would have been exempt as to his debts. It came to his wife as his beneficiary and is equally exempt as to her debts.

As to the policy payable to, and collected by the estate, the estate was the beneficiary, and the money was for the reasons before stated exempt from execution. It was therefore assets of the deceased exempt from execution, and was properly ⁷⁸¹ set apart to the widow, as being so exempt: Code Civ. Proc., sec. 1465; Estate of Miller, 121 Cal. 353, 53 Pac. 906. The administrator or executor is not the owner of any part of the estate. He, in his official character, only holds it in trust for the parties entitled to it, subject to the purposes of administration. The title to the insurance money came to respondent, Annie J. Jenkins, through the estate and under the order setting it apart, and vested the title in her as effectively as if she had been named as the beneficiary of the policy. We can see no reason why the insurance money coming to her directly as beneficiary should be exempt from execution, and not that coming to her indirectly through the estate and the order setting it apart. In either case it is exempt from execution. In one case the instrument of life insurance gives her the title, in the other the law gives it to her. The statute provides that all property exempt from execution shall be set apart for the use of the surviving husband or wife: Code Civ. Proc., sec. 1465. If it is exempt from execution before being set apart, it does not cease to be so the moment it is set apart. The widow takes the family allowance by order of the court. After it is paid to her, it cannot be seized on execution for her prior debts, and diverted from the support of the family. The principle is fully discussed in regard to a homestead set apart for the family in *Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296, 34 Pac. 722. It was there held that the provision for setting apart exempt property including a homestead was for the protection and support of the family. The court said: "The authority given to the court in the first part of section 1465 to set apart for the family 'all the property exempt from execution, including the homestead selected' implies that the property when set apart is exempt from execution. . . . A homestead may be set apart to the widow, even though the

estate be insolvent, and the property so set apart constitute the entire estate of deceased; but if the homestead thus set apart to her could be immediately taken in execution by one of her creditors it would fail to be available for her use or support, and it might happen that her creditor would fare better than a creditor of the decedent whose money had perhaps been used to purchase the very property so set apart."

In *Barnum v. Boughton*, 55 Conn. 117, 10 Atl. 514, it was held that ~~the~~ money paid to the widow as an allowance for her support through the probate court could not be taken or attached by one of her creditors. The court said: "She could neither ask nor receive it for the payment of her debts; the probate court could not grant it for that purpose. . . . If one allowance can be intercepted so can every other; for if the door is opened for one creditor it cannot be closed against any; and the entire estate might thus be diverted from its legal destination. The law will not permit the instant necessities of the widow, and the ultimate rights of the creditors of the estate, to be postponed, in its name, to the demands of her creditors." So in this case the court will not allow the insurance money, which is exempt from execution as to the creditors of the estate, to be taken by the creditors of the widow. It is equally exempt as to them.

Appellant contends that by the deposit of the money in the bank, the money lost its identity, and that thereafter the bank owed Annie J. Jenkins the money. That the debtor thus voluntarily parted with the money, which was exempt, and acquired in lieu thereof a credit due by the bank. Such construction would seem to be unreasonable, and no authority is cited which supports it. It is true that in one sense by the deposit the relation of debtor and creditor was created as between the bank and Mrs. Jenkins, but she put the exempt money in the bank. She regarded it as money in the bank. She expected to and did draw it as she needed it. The bank did not give her the identical pieces of money that she deposited, but it gave her as she drew upon it money equal in value and kind. She was not required to keep the money buried or in her stocking in order to have it remain exempt. If the appellant's theory is correct she could not have paid a five dollar grocery bill with a twenty dollar piece, receiving fifteen dollars in change, without the risk of having the fifteen dollars attached. The law does not require such absurdity. The cases cited by appellant arose under the United States pension laws, and are not in point. The section of the Revised

Statutes construed provides: "No sum of money due or to become due to any pensioner shall be liable to attachment," etc. The courts have correctly held that the section only protected the money while due or in course of transmission to the pensioner. Money due or to become due is designed to protect the amount ⁷³³ of the pension until it reaches the hands of the pensioner. It is then no longer money due or to become due. Our statute exempts the money, and although deposited in the bank it is still money and protected. It has not lost its identity because of the fact that the identical coins or bills deposited are not to be returned. Respondent probably never saw any coins or bills, but took the checks which the insurance company gave her, as evidence that it had the money for her, and deposited them with the bank, having the amounts credited in her bank-book as evidence that she had the money in the bank.

In *Hibernia Savings etc. Soc. v. City and County of San Francisco*, 139 Cal. 205, 96 Am. St. Rep. 100, 72 Pac. 920, it was held that the checks or orders drawn upon the treasurer or assistant treasurer of the United States, payable on demand, are not merely obligations of the United States, but solvent credits subject to taxation. The court said: "The orders were simply a convenient mode of payment of the obligation. They were, for all practical purposes, the money itself." So in the case at bar the credit in the bank is, for all practical purposes under the exemption laws, to be regarded as the money itself. Respondent had the right to have the levy set aside upon the exempt property. Section 556 of the Code of Civil Procedure provides that the writ may be discharged when the same was improperly or irregularly issued. This was not a dissolution of the writ of attachment, but an order setting aside the levy as to the exempt property. It would be strange if a court were so impotent that it could not set aside the erroneous levy of its own writ upon exempt property. Any other rule would compel the injured party to bring a suit for damages, which not only would lead to delay, but might in the end prove futile. Courts have power over their own process and to set aside a levy of a writ of attachment or execution upon exempt property: *Freeman on Executions*, sec. 271; *Ency. of Pl. & Pr.* 579, and cases cited; *Sandburg v. Papineau*, 81 Ill. 446.

It follows that the order should be affirmed.

Gray, C., and Smith, C., concurred.

⁷⁸⁴ For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Henshaw, J., Lorigan, J.

Hearing in Bank denied.

The Exemption of Life Insurance money from execution is discussed in *Estate of Brown*, 123 Cal. 399, 69 Am. St. Rep. 74; *Talcott v. Field*, 34 Neb. 611, 33 Am. St. Rep. 662; *Boisseau v. Bass*, 100 W. Va. 207, 93 Am. St. Rep. 956; *Murdy v. Skyles*, 101 Iowa, 549, 63 Am. St. Rep. 411. Exemption laws are usually given a liberal construction in favor of the debtor: *Roberts v. Parker*, 117 Iowa, 389, 94 Am. St. Rep. 316; *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

LANGDALE v. CITIZENS' BANK OF SAVANNAH.

[121 Ga. 105, 48 S. E. 708.]

BANKS AND BANKING—Savings Banks—Payment to Fraudulent Holder of Passbook.—A rule of savings banks that the depositor shall produce his bank-book in order to draw his deposit or any part of it, and that production of such book shall be authority to the bank to pay the person producing it is a reasonable and binding regulation, and if the bank pays to one having such book, there being no negligence and no circumstances to excite suspicion, the payment is good against the depositor, although the bank-book is presented by one who has no right or title to it. (p. 96.)

BANKS AND BANKING—Savings Banks—Payment to Holder of Bank-book not Its Owner.—Officers of savings banks are required to exercise only reasonable care and diligence in making payments on account of deposits, and if, using such care and diligence, but lacking present means of identifying the claimant of the deposit, they make a payment upon presentation of depositor's bank-book and a forged check, by one apparently in lawful possession of such book as its owner, the bank has a right to rely upon the contract of the depositor to safely keep his bank-book, or to make known its loss before it is presented for payment, and the depositor is bound by the payment thus made, although the bank fails to compare the signature on the check with that of the depositor on file in the bank. (p. 97.)

BANKS AND BANKING—Savings Banks—Rule Binding on Depositor.—A rule of a savings bank providing that "every effort will be made to protect depositors against fraud, but payment made to a person presenting a passbook shall be good and valid on account of the owner, unless the passbook has been lost, and notice in writing given to the bank before such payment is made," is a reasonable rule and binding upon a depositor who has assented thereto by an agreement in writing. (p. 98.)

J. Gazan, for the plaintiff.

Adams & Adams, for the defendant.

¹⁰⁶ CANDLER, J. There is practically no dispute as to the material facts of this case. The defendant in the court below was a banking corporation, conducting, under authority of its charter, a savings department, depositors in which were paid interest on their deposits. The savings department was governed by certain rules and regulations, and depositors were required, upon opening their accounts, to sign an agreement to abide by these rules, of which the following are material to the present discussion: "A depositor must always present his or her passbook when depositing or withdrawing. If not present personally, an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal. . . . Every effort will be made to protect depositors against fraud, but payment made to a person presenting passbook shall be good and valid on account of the owner, unless the passbook has been lost and notice in writing given to this bank before such payment is made." The plaintiff was a depositor in the savings department, and, as such, had assented to ¹⁰⁷ the rules mentioned. The cashier of the bank cautioned him to take good care of his passbook and not let it "lie around loose," pointing out to him the rules on the subject. A check for fifty dollars was drawn against the plaintiff's account, and was cashed. He claims that the check was a forgery, and brings this suit to recover from the bank the amount for which it was drawn. From the plaintiff's testimony it appears that his passbook was kept locked in a trunk, and never, so far as he knew, left his possession. Presumably, however, it was stolen and afterward returned, for the evidence of the bank cashier is undisputed that the person who drew the money on the check presented the passbook, and the first knowledge that the plaintiff seems to have had that the fifty dollars had been withdrawn from the bank was when, on a subsequent occasion, he took the book to the bank for the purpose of withdrawing money, and noticed the entry of the alleged forged check. The admittedly genuine signature of the plaintiff, as well as the signature to the check alleged to have been forged, both appear in the record; and while no member of this court claims to be a handwriting expert, it is obvious that the signatures bear a general similarity to each other. When the check for fifty dollars was presented for payment, the cashier did not compare the signature with the genuine signature of the plaintiff on the books of the bank, but paid the check on the strength of the possession of the passbook and the similarity of the appearance

the person presenting the check to that of the plaintiff as he recollected him. The depositors in the savings department of the defendant numbered more than two thousand, the great majority of whom were persons who did not do a general banking business, who were not frequently seen at the bank, and who were therefore not familiar to the bank officials and employés. The plaintiff was a motorman in the employment of a street railroad company, and the person drawing the check was apparently also a street railroad employé. The testimony for the defendant was positive to the effect that there was nothing to put the cashier, who paid the money, on notice that the check was not genuine, or to arouse his suspicion that the person presenting it was not the plaintiff. As to this the evidence for the plaintiff was in the nature of things, silent. On this state of facts the case went to the jury, who found for the defendant. The plaintiff made a ¹⁰⁸ motion for a new trial, which was overruled, and he excepted. The motion for a new trial contains numerous grounds; but in its last analysis the case turns upon the single question whether, under the circumstances already narrated, and in view of the rules of the defendant bank, it was the duty of the cashier to make a comparison of the signature to the alleged forged check with the genuine signature of the plaintiff on the books of the bank, or if, there being nothing to reasonably excite his suspicion as to the honesty of the transaction, he was authorized to pay the money by reason of the presentation of the passbook and an apparently genuine check.

So far as we are aware, no case has ever been decided by this court which is in point on this subject, and we are therefore compelled to rely upon standard text-books and cases adjudicated by other courts for authority for the ruling now made. There are many points of marked difference between savings banks and ordinary banks which receive deposits subject to check and pay no interest thereon. In the nature of the relationship between the savings bank and its depositors, the rules governing that relationship enter into the contract of deposit, and especially is this so when the depositor agrees in writing that he shall be bound by these rules. It is a common rule of such banks that the depositor shall produce his bank-book in order to draw his deposit or any part of it, and that production of the book shall be authority to the bank to pay the person producing it. "This is regarded as a reasonable and binding regulation, and if the bank pay to one having the book,

there being no circumstances to excite suspicion and base an imputation of negligence on the part of the bank, the payment is good": 2 Morse on Banks and Banking, sec. 620; Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418; Levy v. Franklin Sav. Bank, 117 Mass. 448; Goldrick v. Bristol County Sav. Bank, 123 Mass. 320; Burrill v. Dollar Sav. Bank, 92 Pa. St. 134, 37 Am. Rep. 669; Donlan v. Provident Inst., 127 Mass. 183, 34 Am. Rep. 358; Cosgrove v. Provident Inst., 64 N. J. L. 653, 46 Atl. 617. In the case of Sullivan v. Lewiston Institution of Savings, 56 Me. 507, 96 Am. Dec. 500, which is very closely in point, it was held: "Officers of savings institutions are required to exercise reasonable care and diligence only in making payments on account of deposits. And if, using such care and ¹⁰⁰ diligence but lacking present means of identifying the claimant of the deposit, they make a payment upon presentation of the book by one apparently in the lawful possession of it as owner, the institution has a right to rely upon the contract of the depositor safely to keep the evidence of his claim, or to make known its loss before it is presented for payment, and the depositor is bound by the payment." The reason for such a rule is at once apparent when the nature of savings institutions is considered. Deposits are not subject to check, and most of the depositors are seen but occasionally at the bank, rendering identification of the depositor more difficult than is the case with ordinary banks. By agreement between the bank and its depositors, possession of the passbook is made prima facie evidence of the right to draw upon the fund which it represents. The check itself is unlike checks drawn upon ordinary banks, not being negotiable and being in reality nothing but a receipt for the money drawn. Of course a savings bank would be liable if its officers or employes should negligently or recklessly pay out money to one not entitled to receive it; and this seems to be the basis of the cases relied upon as authority by counsel for the plaintiff in error. But in this case there seems to have been no negligence chargeable to the bank. The money was paid in good faith to one in possession of the plaintiff's passbook and apparently clothed with the right to that possession. Under the rules of the bank, assented to by the plaintiff, possession of the passbook was prima facie evidence of the right to draw the money which it represented; and there seems to have been absolutely nothing to put the teller on inquiry as to the genuineness of the check. Under these circumstances we cannot hold that it was his duty to go

further and compare the signature with that of the plaintiff, on file in the bank, and that, failing in this, the bank is liable for the money so paid out.

Much stress is laid, in the brief of counsel for the plaintiff in error, upon the rule that unless the depositor is personally present with his passbook when drawing money, "an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal," and it is urged that because the plaintiff did not appear in person, and the person who did present the passbook had no order as required by the rule, the bank is ¹¹⁰ liable for the payment of the money. Thoughtful consideration must show that this argument is entirely specious. Plainly, this rule has no application to a case like this, where the check drawn was in fraud of both the plaintiff and the bank. Its purport is merely to show that a savings bank account is not negotiable by delivery of the passbook, and to prescribe that when a depositor wishes to assign his funds on deposit, he must do it in a certain manner. It is also urged that the rule reciting that "every effort will be made to protect depositors against fraud" required that the cashier or teller to whom the check was presented should at least compare the signature to the check with that of the plaintiff on file with the bank; and that the ensuing clause, "but payment made to a person presenting passbook shall be good and valid on account of the owner," etc., when taken in connection with the first part of the rule conveys the meaning that the bank will only be excused from liability when it pays the money after having exerted "every effort" and used extreme caution to prevent fraud. We cannot agree with this construction of the rule. Giving it what seems to us a reasonable intendment, the rule means this: We will do what we can to keep you from being defrauded, but as the passbook is *prima facie* evidence of the right to draw money, you must look well after your passbook and see that it does not fall into the hands of a thief or forger. Our means of identification are imperfect, and if your passbook is presented by some one other than yourself, with apparent right to draw your money we will, unless our suspicions are aroused, honor his check without further question. We will deal honestly and fairly with you, but you must take every precaution to protect yourself by the preservation of your passbook. Such a rule is reasonable, and as the plaintiff in the present case assented to it in writing, he is bound by its terms.

The foregoing disposes of the case on its substantial merits; and it follows that, regardless of inaccuracies in the charge of the court as disclosed by the motion for a new trial, the verdict was demanded, and the judgment overruling the motion will not be disturbed.

Judgment affirmed.

All the justices concur.

For Authorities bearing upon the decision in the principal case, see Kingsley v. Whitman Sav. Bank, 182 Mass. 252, 94 Am. St. Rep. 650, and cases cited in the cross-reference note thereto; Mahon v. South Brooklyn Sav. Inst., 175 N. Y. 69, 96 Am. St. Rep. 603; Arkofsky v. State Sav. Bank, 91 Minn. 440, 103 Am. St. Rep. 519.

EVERETT-RIDLEY-RAGAN COMPANY v. TRADERS' INSURANCE COMPANY.

[121 Ga. 228, 48 S. E. 918.]

INSURANCE—Fire—Keeping Books—Noncompliance with Policy.—A contract of fire insurance which requires the insured to "keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," is not complied with by merely keeping a daily cash-book which only shows the amount of cash taken in at the end of each day, giving no indication of the source from which the cash is derived, whether from cash sales, the payment of past due bills, or otherwise; and evidence establishing the fact of keeping such cash-book alone, shows such a noncompliance of the insured with his contract of insurance as prevents him from recovering on the policy. (p. 100.)

Edwin & Callaway and M. W. Harris, for the plaintiff.

Davis & Turner, Hardeman & Jones and Smith, Hammond & Smith, for the defendant.

228 CANDLER, J. This was a suit upon a policy of fire insurance. The plaintiffs bring the case to this court on exceptions to the grant of a nonsuit, the exclusion of certain documentary evidence offered by them, and the refusal of an amendment to their petition. In our opinion the proper decision of the case turns on the question whether or not there was a sufficient compliance on the part of the insured with that part of the "iron-safe clause" of his policy, which required him to "keep a set of books, which shall clearly and plainly present a complete

record of business transacted, including all purchases, sales and shipments both for cash and credit, from date of inventory, as provided in first section of this clause and during the continuance of this policy." The insured testified: "I do not know how from my books it could be ascertained the value of the stock of goods at the time it was burned, except from my independent recollection of the amount of goods on hand, and from the entries made on my ledger of purchases by me. . . . I had a cash-book, a day-book and a ledger; these were all the books that I ever kept ²²⁹ or had at the time of the fire. I did not keep a book of invoices. . . . I kept no record of my cash sales except in making up my cash-book at night." Immediately after the fire the insured made a written statement containing, among other things the following: "I have only one book known as ledger dating 1899 and 1900. All other books were destroyed by fire. I kept no record of cash sales. Ledger shows all purchases made, and also all credit sales." We are clear that this evidence establishes a noncompliance on the part of the insured with his contract of insurance, and that therefore there can be no recovery on the policy. The evident intention of this clause of the contract is to enable the insurance company, by means of accurate records of the business of the insured, to ascertain with substantial certainty and definiteness the value of the stock of goods destroyed by fire; and here it is admitted that even if the books which were destroyed were produced in court, they would furnish no reliable information on that subject. A cash-book which only shows the amount of cash taken in at the end of each day, giving no indication of the source from which the cash is derived, whether from cash sales from the payment of past due bills, or what not, can in no sense be considered "a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit." A case in point, although it goes somewhat further than we find it necessary to go in the case at bar, is that of *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103, cited in *Ostrander on Fire Insurance*, second edition, section 300. In that case the policy contained a provision practically identical with the one now under consideration, and "the principal contention between the parties related to the question of whether the assured had complied with the terms of the policy in regard to keeping books containing a record of his purchases and sales." The following is quoted from the opinion of the court: "While it may be, that, being a country merchant, whose system of bookkeeping was known to

appellant, he was not required to keep a full set of commercial books, yet it was his duty to comply with the agreement contained in his policy. This the contract required as a condition upon which his recovery depended. . . . He testified that he kept a 'credit or sale' book, showing all credit sales; that he ^{also} kept a 'cotton-book,' showing all cash and goods paid for cotton; and that he kept a 'cash account,' showing all cash taken in, and copies of bills of purchase, showing all goods purchased. . . . Appellee testified that he kept a merchandise account and a cash account, . . . and it appears at the end of each month he entered the amount of purchases during the month, and that he kept a book in which he entered each day his cash sales, and that at the end of each month he entered the aggregate amount of cash received on his books. . . . It is impossible to obtain any correct or satisfactory idea of the amount of goods on hand and destroyed by the fire, from this mode of bookkeeping. For aught the books show, goods of the value of four hundred dollars may have been sold for forty dollars, as the items are not given, but only the aggregate amount of sales. . . . The appellee, having failed to keep a set of books showing a record of all business transacted, including purchases and sales for cash or credit, as he undertook to do, was not entitled to recover." See in this connection, however, the case of *Liverpool etc. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006, where this court has adopted a more liberal rule than was held by the *Arkansas* case, *supra*.

As before indicated, the point discussed in the foregoing substantially controls the decision of the case adversely to the contentions of the plaintiffs in error. The amendment offered sought to set up a waiver, on the part of the insurance company, of any benefits that it might derive from a noncompliance with the terms of the policy by the insured. The grounds upon which it is contended that noncompliance with the terms of the policy was waived were, that the company received from the insured within sixty days after the fire, written notice of the fire and proofs of loss; that it called upon him to produce certain invoices and required him to submit to an examination concerning the fire; that it failed to return a payment of his premium made after the fire occurred; that it put him to expense in securing duplicate invoices; and that it refused to pay the loss. None of these allegations are sufficient to constitute a waiver of noncompliance with the terms of the iron-safe clause. It was the duty of the insured, under his contract with the company, to give

notice of the fire and produce satisfactory proofs of loss and documentary evidence required thereunder. The payment of the premium was ²³¹ but the just compensation due the company for the risk it had assumed upon the issuance of the policy, and its acceptance and retention in no wise prevented it from asserting its rights under the contract: 2 May on Insurance, 4th ed., sec. 567. Of course the refusal to pay the loss, under the circumstances of the present case, is in no respect a waiver. In view of the affirmative evidence of the assured that he violated that portion of his contract which we have had under consideration, it can in no event be held that the refusal of the amendment was error. In like manner, the ledger which was excluded from evidence would not, according to the plaintiffs' own showing, have benefited their case, and, regardless of whether it was properly identified, its exclusion was not erroneous.

Judgment affirmed.

All the justices concur.

A Condition in a Policy of fire insurance that the insured shall keep a set of books and preserve an inventory, and, in case of a loss, produce them, is valid: Sowers v. Mutual Fire Ins. Co., 113 Iowa, 551, 85 N. W. 763. But such conditions have usually been accorded a reasonable interpretation so as not to work a forfeiture if substantially complied with: Western Assur. Co. v. McGlathery, 115 Ala. 213, 67 Am. St. Rep. 26. In the absence of an express stipulation to the contrary, a covenant to keep books will be construed to mean that they shall be kept in the time and manner usual and customary with merchants: Jones v. Southern Ins. Co., 38 Fed. 19. An inventory which is merely a summary, for the most part, of the condition of the goods, is held not sufficient: Delaware Ins. Co. v. Monger (Tex. Civ. App.), 74 S. W. 792. See, also, Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295; Phoenix Ins. Co. v. Schwartz, 115 Ga. 113, 90 Am. St. Rep. 98.

HOLMES v. CLISBY.

[121 Ga. 241, 48 S. E. 934.]

LIBEL AND SLANDER.—Privileged Communications include statements reasonably necessary to be made, and made in good faith, to protect the interests of the maker, or of one for whom he is agent. (p. 105.)

LIBEL AND SLANDER.—Privileged Communications.—Willful falsehoods are always inconsistent with good faith, and can never constitute privileged communications. (p. 106.)

LIBEL OF COMMUNITY.—One who willfully publishes a libel aimed at a community will be held responsible to anyone whom it may injure, although he may be a stranger to the libeler. (p. 107.)

LIBEL OF A CLASS.—One who, without exercising due care to ascertain the meaning and effect of a writing which is libelous of a class, publishes it under circumstances where it would be construed as applicable to one or more persons of such class, cannot shield himself on the ground of privileged communication, and that he did not know that it was harmful, in its nature, when the exercise of the slightest care and intelligence would have demonstrated that the publication would be harmful to some who were within the range of its effect. (p. 107.)

LIBEL—Question for Jury.—If a publication is claimed to be a libel only when taken in connection with the circumstances of its publication, the jury should be directed to determine from the writing and such circumstances whether it is libelous or not. (p. 107.)

LIBEL—Question for Jury.—It is generally a question for the jury whether the writing complained of is libelous or not. (p. 107.)

LIBEL—Burden of Proof—Inference of Malice.—It is incumbent upon the plaintiff in a suit for libel to prove the publication of a writing which is susceptible of being construed to be a libel, and the law then immediately raises in his behalf a presumption that he is innocent of the charge and that the disperser of the libel was actuated by malice. (p. 108.)

LIBEL—Evidence to Rebut Inference of Malice.—Evidence, though insufficient to establish good faith and to sustain a plea of privilege, may still be of a character sufficient to rebut the inference of malice and to mitigate damages. (p. 108.)

NEW TRIAL—Instructions.—Failure of the court to explain to the jury the meaning of technical terms used in his instructions is not ground for a new trial in the absence of an appropriate and timely request for such explanation. (p. 109.)

TRIAL.—The Allowance of Leading Questions. is within the discretion of the trial judge, especially where the witness is examined by written interrogatories. (p. 109.)

LIBEL—Damages.—If, in an action for libel, the evidence demands a finding that the article as published was a libel upon the plaintiff, but not actuated by malice, the jury are authorized to mitigate the damages, even to the extent of reducing them to a nominal sum, but not to find a general verdict for the defendant. (p. 109.)

LIBEL—Damages.—If, in an action for libel, the jury are authorized to find that the published article was a libel upon plain-

tiff, though not actuated by malice, and to mitigate damages even to a nominal sum, it is error for the trial judge to fail to instruct the jury in reference to the law of nominal damages, even though there is no written request for such instructions. (pp. 109, 110.)

The following is the publication complained of as libelous:

"QUEEN QUALITY.

"LADIES OF MACON:

"We hereby give notice that the firm of Clisby & McKay is our only authorized agent in Macon for the sale of genuine QUEEN QUALITY shoes under our guarantee. Our damaged shoes we sell to certain dealers under an agreement that they shall be sold as imperfect goods, as we are not willing that damaged or second quality shoes of our make shall be offered to the public as first quality, even when the damage is not apparent to the eye. Those who buy Queen Quality shoes of other dealers than those designated by us as our authorized agents will have only themselves to blame for any disappointment or loss that may ensue.

"THOMAS G. PLANT CO."

J. Moore, M. W. Harris and Dessau, Harris & Harris, for the plaintiff.

Steed & Ryals and Lane & Park, for the defendant.

243 COBB, J. 1, 2. When this case was before this court on a former occasion it was said: "That the publication was intended to refer to the plaintiff cannot, in view of the allegations of the petition, admit of doubt. If one reading the publication knew that it referred to the plaintiff, knew that he was selling Queen Quality shoes at a reduced price, the inference was irresistible that he was selling damaged goods; and when this is coupled with the further fact that the plaintiff had advertised that his goods were perfect and undamaged, the conclusion is well warranted that the author of the publication intended to charge that the plaintiff's advertisement was false, and that in inserting the **244** advertisement he was guilty of a deliberate falsehood and intended thereby to cheat and defraud the ladies of Macon who were likely to become his customers": *Holmes v. Clisby*, 118 Ga. 823, 824, 45 S. E. 686. The defendant in his answer denies that the publication referred to the plaintiff or was intended to refer to him. He claims that he was advised that certain shoes manufactured by the Plant company, but inferior to those stamped Queen Quality, were sold generally to the trade in

Macon and throughout the country, and that there was great danger of such shoes being confused with Queen Quality shoes, in the sale of which the defendant was interested; that the advertisement was furnished him by the Plant company, and was published by him in good faith to protect his own interests as the seller of the Queen Quality shoes, and also in the discharge of the private duty owing to his principal, the Plant company, to protect its business interests. If there were persons in Macon, or elsewhere, who were selling shoes of the Plant company, which were imperfect or damaged, as perfect shoes of the Queen Quality stamp, then the defendant had a right, as the seller of the genuine Queen Quality shoes, and as the agent of the Plant company, to communicate this fact to the public. If, in his communication to the public, he used such words only as were appropriate and necessary to accomplish the desired end—that is, to place the public on notice that they were liable to be deceived—and the communication was made in good faith in the belief that the statements therein were true, it would be properly classed as one which was privileged under the law, and the defendant would not be liable to one who was engaged in selling in Macon the genuine Queen Quality shoes, unless it appeared from the publication and the circumstances under which it was made that what was stated in the advertisement, taken in connection with the circumstances, must have been intended to apply to such seller, and when so applied could have no other meaning than that such seller was selling damaged shoes of the Plant company as perfect Queen Quality shoes, and that the defendant knew at the time of the publication that the shoes sold by the plaintiff as Queen Quality shoes were in fact perfect shoes of that brand. If the communication was of the character above indicated, and published under the circumstances referred to, it could not be properly classed as privileged as against the ²⁴⁵ seller of the genuine Queen Quality shoe, who was known to be such by the publisher of the advertisement; for such a communication, under such circumstances, would contain a willful falsehood. Such a falsehood is always inconsistent with good faith, and is never privileged either in law or morals: *Etchison v. Pergerson*, 88 Ga. 621, 15 S. E. 680 (4). The plea of privilege was good in substance, although it may have been subject to special demurrer. Hence the court did not err in instructing the jury in reference to the law of privileged communications.

3. Did the evidence sustain the plea of privilege? The defendant testified that he did not write the advertisement; that it

was furnished to him by the Plant company on a form which had been used in Boston and in a number of other places; that while he read it before he had it published, he did not read with a great deal of care; that he presumed it was simply a notice of a change of agency; and that he did not have the plaintiff in mind at the time of the publication, nor was it the result of the cut-price sale had by the plaintiff. The defendant admits that he knew that the plaintiff was selling genuine Queen Quality shoes. The evidence conclusively shows that the plaintiff was the only person, except the defendant, engaged in the sale of these shoes in Macon. The evidence is of such a character as to almost demonstrate with certainty that at the time of the publication any one in Macon, who had any information in reference to the shoe market, could not reach any other conclusion upon reading the advertisement than that it was intended to apply to the plaintiff so far as it referred to the sale of Queen Quality shoes. There may have been others in Macon engaged in the sale of other brands of shoes of the Plant company's manufacture, but the plaintiff was the only seller of the genuine Queen Quality shoes that the advertisement could possibly apply to. But the defendant in effect says that: "The plaintiff was not in my mind; I was not thinking of him; I was not thinking of his cut-price sale; the publication was to protect my principal and myself against those unscrupulous persons who were engaged in the sale of damaged shoes as perfect Queen Quality shoes." If the advertisement was intended simply as a notice to the public that the Plant company had changed its agents, both the Plant company and its agent were doubly unfortunate in the language employed to convey this information ²⁴⁶ to the public, as well as the time when and the circumstances under which this fact was published. It cannot be said, under the testimony, that the defendant has published about the plaintiff that which he knew to be false, but under the testimony the question arises whether, in not informing himself as to the true meaning of the advertisement as applied to the circumstances under which it was to be published, he is not guilty of such negligence and such an utter disregard of the rights of others that his alleged good faith would no more protect him than it would if he had made the publication with a full knowledge of its meaning and effect. One who knowingly discharges a loaded gun into a crowd, and thereby destroys human life, is guilty of crime, although he may not know the person whose life is taken. If one points a gun at a crowd and does everything necessary to discharge it, and it is actually discharged and

injures another, he will not be held blameless although he in good faith believes that the gun is not loaded. And one who recklessly handles a loaded gun under such circumstances that, if discharged, human life might be destroyed, is guilty of manslaughter, if the gun is discharged and another is killed, although he have no intention to kill and no intention to discharge the gun. One who willfully discharges a libel at a community will be held responsible to anyone whom it may injure, although he may be a stranger to the libeler; and it would seem, upon principles of common sense and justice, that one who, without exercising due care to ascertain the meaning and effect of a writing which is libelous of a class, publishes it under circumstances where it would be construed as applicable to one or more persons of such class, should not be held blameless upon the plea that he did not know that it was harmful in its nature, when the exercise of the slightest care and the application of the slightest intelligence would have demonstrated that its publication would be harmful to some who were within the range of its effect. It is immaterial "whether he who disperses a libel knew anything of the contents or effects of it or not": 6 Bacon's Abridgment, 354; 3 Greenleaf on Evidence, 16th ed., sec. 171. We do not think that the evidence, taken as a whole, was sufficient to sustain the plea of privilege.

4. In the trial of an action for libel the judge should instruct the jury as to what constitutes a libel under the law, and then ²⁴⁷ leave to their determination the question whether the language of the writing complained of is libelous, if it is claimed that the libel appears upon the face of the writing; or, if claimed to be a libel only when taken in connection with the circumstances of its publication, the jury should be directed to determine from the writing and the circumstances of its publication whether it was libelous. The general rule is that it is a question for the jury to determine whether the writing complained of is libelous or not, and only in cases where a crime is distinctly charged, if at all, should the jury be instructed that the writing is a libel: See *Beazley v. Reid*, 68 Ga. 380; *Baker v. State*, 97 Ga. 453, 25 S. E. 341 (7); *Colvard v. Black*, 110 Ga. 646, 36 S. E. 80.

5. Error was assigned upon the following instruction: "It is essential to the existence of a proof of a libel in a court of law for the evidence to show the falsity of the libel, the malice contained in the libel, the defamation tending to injure the reputation of the petitioner and exposing him to public hatred, contempt or

ridicule, and the publication of the libel itself." It is insisted that this charge was erroneous, for the reason that it placed upon the plaintiff the burden of proving that the charge contained in the alleged libelous writing was false, and that it was maliciously published. If this instruction can be so interpreted, of course it is erroneous. If a writing charges another with doing an act which is calculated to expose him to public hatred, contempt or ridicule, the law will presume that the charge was false, because persons are not, as a general rule, guilty of such acts. Especially would such a presumption arise in a case where the writing charged the commission of a crime, the presumption of innocence which arises in such cases being in effect a presumption that the charge was false. Men are presumed to be innocent of criminal, disreputable or otherwise disgraceful conduct; and when one is charged with such conduct, the law infers from the character of the charge that he who makes it is moved by malice to prefer it. It is therefore incumbent upon the plaintiff in a suit for libel to prove the publication of a writing which is susceptible of being construed to be a libel, and the law immediately raises in his behalf a presumption that he is innocent of the charge and that the disperser of the libel was actuated by malice. The judge evidently had in mind the principles just referred to, but the ²⁴⁸ charge complained of was not altogether free from misleading features.

6. The defendant was permitted to prove that he obtained the advertisement from the Plant company in Boston, and that it had been used in Boston and in other places; and was also permitted to prove how the Plant company sold Queen Quality shoes and shoes of other brands, and what disposition was made of imperfectly made shoes; and was also permitted to introduce the contract with the Plant company in reference to the sale of the Queen Quality shoes, and evidence as to the agencies of the Plant company in Macon. All of this evidence was objected to by the plaintiff, upon the ground that it was irrelevant and immaterial. In actions for libel, while the law infers malice from the character of the charge, the defendant is allowed to rebut this inference by proof; and the evidence objected to was of such a character as might have had some bearing on this question. While it would not be sufficient of itself to establish good faith so as to discharge the defendant under his plea of privilege, still all of it might be considered on the question of malice and in mitigation of damages.

Complaint is made that the court erred in failing to explain to jury the expressions, "mitigation of damages," and "privi-

leged communications," each of which occurs a number of times in the charge. There was no request for an instruction in reference to these matters. The average legal mind does not always carry a correct idea of the various words and phrases which have a technical meaning in the law. Hence, it is not to be expected that the unprofessional men of the jury can, without explanation, grasp the meaning of such expressions. It is therefore the better practice in all cases for the judge to explain to the jury the meaning of such expressions when they occur in his instructions. Failure to do so, however, will not generally, in the absence of a timely and appropriate written request, be a ground for a new trial: See *Roberts v. State*, 114 Ga. 450, 40 S. E. 297 (3).

8. A witness for the defendant was examined by written interrogatories. The plaintiff, in due time and in the proper manner, filed written objections to certain of the interrogatories, on the ground that they were leading. Notwithstanding such objections the court allowed the answers to be read. It is now thoroughly ²⁴⁰ settled that the allowance of leading questions is within the discretion of the judge; and especially is this true where the witness is examined by written interrogatories: See the remarks of Judge McCay in *Ewing v. Moses*, 51 Ga. 410, 419. See, also, *Franks v. Gress Lumber Co.*, 111 Ga. 87, 36 S. E. 314; and cases cited in 4 Enc. Dig. Ga. R. 455.

9. Under no view of the case does it seem to us that the defendant was entitled to a verdict. The plaintiff was entitled to at least nominal damages—that is, a sum sufficient to carry the costs. Whether there should be a recovery for an amount greater than this, we express no opinion. The defendant admitted the publication of the article complained of. The evidence demanded a finding that, when published under the circumstances indicated by the evidence, the ordinary reader of the Macon paper, who knew that the plaintiff was engaged in the sale of Queen Quality shoes, and was the only dealer interested in the sale of such shoes, except the defendant, would at once reach the conclusion, not only that the article referred to the plaintiff, but that it was intended to charge him with selling defective shoes as perfect shoes of the Queen Quality brand. In other words, the evidence demanded a finding that the article, published under the circumstances existing at the time of the publication, was a libel, and was a libel upon the plaintiff. The evidence authorized a finding that the defendant was not actuated by malice. Under such circumstances, the jury were authorized to mitigate the damages, even to the extent of reducing them to a mere nominal sum; but they were not authorized to find a general verdict for the defend-

ant, for the reason that the only plea upon which such a verdict would have been warranted was a plea of privilege, and the proof failed to establish this plea. It was error for the judge to fail to instruct the jury in reference to the law of nominal damages, even though there was no written request for such an instruction.

The foregoing part of this opinion disposes of all the questions which require any elaborate discussion. There was no error in allowing the defendant to show by a witness who was in the employment of the Plant company, what was the meaning intended to be conveyed by the use of the expressions, "as damaged shoes" and "imperfect goods," which appear in the libelous publication. The reference by the judge in his charge to an admission ²⁵⁰ in the petition in favor of Clisby was evidently an inadvertence, as there was no such admission. The code declares that in a suit for libel malice "is inferred" from the character of the charge: Civ. Code, sec. 3833. The judge in his instructions said malice "may be inferred." This was an inaccuracy and was possibly harmless, but the better rule would be to follow the exact language of the code. Complaint was also made of other portions of the charge, which are not necessary to be referred to. While some of them might be subject to the criticism that they were misleading, none of them contain errors of such a character as to require a reversal. On another trial the judge will no doubt relieve the charge of all such portions as may be subject to criticism.

Judgment reversed.

All the justices concur.

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I. Scope of Note.

In this note we shall consider only the later cases on the subject of this note, since the earlier cases were considered in the exhaustive note on "Newspaper Libels," attached to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369. We shall not consider cases involving actions for slander, except incidentally. Nor shall we consider the subject of privileged communications as applied in prosecutions for criminal libel. Inasmuch as many of the cases seem to hold that criticism, when strictly within the bounds of legitimate criticism, does not constitute libel, we shall not enter into a discussion of the application of the doctrine of privilege in such cases except in so far as the subject appears to be germane to a proper understanding of the subject of this note.

II. Definition of Privilege.

a. In General.—In the leading English case of *Wright v. Woodgate*, 2 Crompt. M. & R. 573, the court observed: "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." This definition has been quoted approvingly in *Morse v. Times-Republican Ptg. Co.* (Iowa), 100 N. W. 867; *Nichols v. Eaton*, 110 Iowa, 509, 80 Am. St. Rep. 319, 81 N. W. 792, 47 L. R. A. 483; *Bacon v. Michigan Cent. R. R.*, 66 Mich. 166, 33 S. W. 181. See, also, *Rothholz v. Dunkle*, 53 N. J. L. 438, 26 Am. St. Rep. 432, 22 Atl. 193, 13 L. R. A. 655, to the same effect. And in *Conroy v. Pittsburgh Times*, 139 Pa. St. 334, 23 Am. St. Rep. 188, 21 Atl. 154, 11 L. R. A. 725, the court said: "A privileged occasion is defined as made upon a proper occasion from a proper motive and based upon reasonable or probable cause: *Briggs v. Garrett*, 111 Pa. St. 404, 414, 56 Am. Rep. 274, 2 Atl. 513. Perhaps there ought also to be added that it should be made in a proper manner; for if the manner be improper the privilege is lost." The Minnesota court in *Hebner v. Great Northern Ry.*, 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128, also observed that in order to be privileged, a communication must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause, and cited *Missouri Pac. Ry. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555, 4 L. R. A. 280; *Bacon v. Michigan Cent. R. R.*, 66 Mich. 166, 33 N. W. 181. Most of the cases which discuss what constitutes a privileged communication are cases involving a qualified privilege, and very often in their observations on the subject omit to consider the effect of an absolute privilege. We will discuss the effect of absolute and qualified privileges later on. In many of the states, statutes

have been enacted modifying the law of libel with a view to enlarging the circumstances under which newspapers may either wholly escape liability or may diminish the amount of damages otherwise recoverable: See monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 346. The great underlying principle upon which the doctrine of privilege is based is that of public policy: *Bacon v. Michigan Cent. R. R.*, 66 Mich. 166, 33 N. W. 181; *Bourreseau v. Detroit etc. Co.*, 63 Mich. 425, 6 Am. St. Rep. 320, 30 N. W. 376.

b. **Absolute and Conditional or Qualified Privilege.**—Libelous statements which are of a privileged character are said to be either absolutely privileged or conditionally privileged. The term “qualifiedly privileged” being, however, more frequently used as synonymous with the term “conditionally privileged”: *Coogler v. Rhodes*, 38 Fla. 240, 56 Am. St. Rep. 170, 21 South. 109. An absolutely privileged communication is one in respect to which, by reason of the occasion on which it is made, no remedy can be had in a civil action, whereas, a conditional or qualified communication is one which only furnishes a prima facie lawful excuse for the making of it: *Cooley v. Galyon*, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. 607, 60 L. R. A. 139. The class of libelous statements which are absolutely privileged is very limited, but the class of statements which are qualifiedly privileged is quite large.

III. Distinction Between Privilege, Criticism and Justification.

In the leading English case of *Merivale v. Carson*, 20 Q. B. Div. 275, the court, in drawing the distinction between privilege and criticism, said: “A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But in the case of a criticism upon a published work, every person in the kingdom is entitled to do, and is forbidden to do exactly the same things, and therefore the occasion is not privileged.” So, also, in another leading English case, that of *Campbell v. Spottiswoode*, 3 Best & S. 769, it was observed that the term “privileged” is often used loosely with reference to imputations which may or may not exceed the limits of criticism or comment. The court held that if the alleged libelous words are within the range of fair comment or criticism they do not constitute a libel. In *Belknap v. Ball*, 88 Mich. 583, 21 Am. St. Rep. 622, 47 N. W. 674, 11 L. R. A. 72, it was held that criticism is discursive, or, as applicable in libel cases, a censure of the conduct, character or utterances of the person criticised. In *Beare v. Bass*, 88 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411, the court observed: “It is sometimes said that fair and honest criticism in matters of public concern is privileged. But this is not true in a
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legal sense. The distinction between fair and reasonable comment and criticism and privileged communications is this: That in the latter case the words may be defamatory, but the defamation is excused or justified by reason of the occasion; while in the former case the words are not defamatory of the plaintiff, and hence not libelous—the stricture or criticism is not upon the person himself, but upon his work. So long, therefore, as the criticism is confined to his work, and does not attack the moral character or professional integrity of the individual, and is fair and reasonable, there is no libel because there is no defamation of the man himself. But when the comment or criticism of the man's work becomes an attack on his private or business character, then the element of malice comes in and stamps the language as libelous." The recent case of *Triggs v. Sun etc. Assn.*, 179 N. Y. 155, 103 Am. St. Rep. 841, 71 N. E. 739, 66 L. R. A. 612, illustrates very clearly the difference between criticism, jests and defamation. Many cases, however, may be found in which it is stated that the criticism or comment, which amounted to a libelous statement, was privileged, but an examination of those cases will disclose that the privilege arose by virtue of the occasion or circumstances under which the criticism or comment was published. In *Cherry v. Des Moines Leader*, 114 Iowa, 298, 89 Am. St. Rep. 365, 86 N. W. 323, 54 L. R. A. 855, which arose over a very sarcastic criticism of a public performance, the court observed: "That it was published of and concerning plaintiff in her role as a public performer scarcely admits of doubt, and it is well settled that the editor of a newspaper has the right to freely criticize any and every kind of public performance, provided that in so doing he is not actuated by malice. In other words, the article was qualifiedly privileged: *Gott v. Pulsifer*, 122 Mass. 238, 23 Am. Rep. 322; *Fry v. Bennett*, 28 N. Y. 324; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698; *Dooling v. Budget Publishing Co.*, 144 Mass. 258, 59 Am. Rep. 83, 10 N. E. 809. The occasion was such that the presumption of malice arising from the publication is rebutted, and plaintiff, in order to recover, must prove actual malice."

Although the decisions quite frequently speak of criticism and comment as being privileged, it would seem that the true rule in that respect is this, namely, that if the alleged libelous criticism and comment is fair and reasonable, then the alleged libelous statement is not in fact libelous, and consequently the question whether they are privileged is immaterial, but if the alleged libelous statement exceeds the bounds of fair and reasonable criticism or comment, it then becomes libelous, and in that event the occasion and circumstances under which it was published becomes material in determining whether it was privileged in the same manner that the occasion and circumstances are material in determining the privileged character of any other libelous statement. In other words, a statement which exceeds the bounds of legitimate criticism may on some

occasions and under some circumstances become a privileged libelous statement, while if made on a different occasion or under different circumstances it would be a libelous statement, but without being a privileged libelous statement. But it would also seem that a statement which is strictly criticism or comment does not need to have the benefit of privilege attached to it, for the reason that the statement under such circumstances is not libelous, and, not being libelous, does not need the benefit of privilege to save its author from any legal liability for its publication.

Justification, as applied to the law of libel and slander, does not imply that something has been done which is privileged or excused on account of some duty owing by the publisher to the public or to the person to whom the publication was made: See monographic note to *Rutherford v. Paddock*, 91 Am. St. Rep. 286.

IV. Necessity for Statement to be Free from Malice.

The doctrine of privilege does not apply to a libelous statement on a qualifiedly privileged occasion if the making of the statement was actuated by malice: *Dennehy v. O'Connell*, 66 Conn. 175, 33 Atl. 920; *Central of Georgia Ry. v. Sheftall*, 118 Ga. 865, 45 S. E. 687; *Coogler v. Rhodes*, 38 Fla. 240, 56 Am. St. Rep. 170, 21 South. 109; *Wharton v. Wright*, 30 Ill. App. 343; *Hollenbeck v. Ristine*, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355; *Gardemal v. McWilliams*, 43 La. 454, 26 Am. St. Rep. 195, 9 South. 106; *Martin v. Paine*, 69 Minn. 482, 72 N. W. 450; *Alabama etc. Ry. Co. v. Brooks*, 69 Miss. 168, 30 Am. St. Rep. 528, 13 South. 847; *Hamilton v. Eno*, 81 N. Y. 116; *McIntyre v. Weinert*, 195 Pa. St. 52, 45 Atl. 666; *Cranfill v. Hayden* (Tex.), 80 S. W. 609. In *Smedley v. Soule*, 125 Mich. 192, 84 N. W. 63, it was said where defendants admit that they have no foundation whatever for the publication of the libelous matter and no reason to believe it to be true, the rule of privilege does not obtain. And in *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 768, 9 S. W. 753, 2 L. R. A. 405, it was said that a privileged publication is actionable only when express malice is shown to have instigated it, or such gross disregard of the rights of the person injured as is equivalent to malice in fact.

But on the question whether liability attaches to a libelous statement made on an absolutely privileged occasion, the authorities, strange to say, are not harmonious. It would seem that from the very fact that any occasion could be termed such a one as to be an occasion of absolute privilege would indicate that there could be no question about the freedom from liability for words published on such an occasion, even though actuated by malice. The courts, however, are very loath to hold any occasion to be one of absolute privilege. A thorough examination of the cases holding that express malice may be shown, even where the occasion is one of absolute privilege, will show that the occasion at bar was one which was not

strictly an absolutely privileged occasion, or that the libelous language was not material or pertinent to the occasion. Probably the weight of authority sustains the rule that it is immaterial whether the person making the libelous statement was actuated by malice if the occasion was one of absolute privilege: See *Wharton v. Wright*, 30 Ill. App. 343; *Gardemal v. McWilliams*, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 South. 106; *Finley v. Steele*, 159 Mo. 304, 60 S. W. 108, 52 L. R. A. 852; *Nissen v. Cramer*, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 780; *Cranfill v. Hayden (Tex.)*, 80 S. W. 609; *Runge v. Franklin*, 72 Tex. 585, 13 Am. St. Rep. 833, 10 S. W. 721, 3 L. R. A. 417; *Johnson v. Brown*, 13 W. Va. 71. In the last two cases, the authorities pro and con on this question are very exhaustively and ably reviewed. But a respectable number of authorities seem to hold to the view that proof of express malice in making of any libelous statement will render the publisher liable: See as tending to sustain this view the following cases: *White v. Nicholls*, 3 How. (U. S.) 266, 11 L. ed. 591; *Comfort v. Young*, 100 Iowa, 629, 69 N. W. 1032; *Maurice v. Worden*, 54 Md. 255, 39 Am. Rep. 388; *Eviston v. Cramer*, 47 Wis. 662, 3 N. W. 394. In *McGaw v. Hamilton*, 184 Pa. St. 108, 63 Am. St. Rep. 786, 39 Atl. 4, in a slander case, it was held that a member of a legislative body cannot take advantage of his official position to give expression to private slanders against others and their claim that his words are privileged. The case of *White v. Nicholls*, 3 How. (U. S.) 266, 11 L. ed. 591, is the leading case holding the view which practically amounts to a denial of an absolute privilege. Although *White v. Nicholls* is not generally regarded as overruled, its weight would seem to have been seriously weakened by the case of *Vogel v. Gruaz*, 110 U. S. 815, 4 Sup. Ct. Rep. 12, 28 L. ed. 160, which was a suit for damages for words uttered to a prosecuting attorney with a view to prosecuting the plaintiff for larceny. The court, after adverting to the statutory provisions authorizing the prosecuting attorney to "commence and prosecute" such actions, said: "Under this provision it was the province and the privilege of any person who knew of facts tending to show the commission of a crime to lay those facts before the public officer, whose duty it was to commence a prosecution for crime. Public policy will protect all such communications, absolutely, and without reference to the motive or intent of the informer or the question of probable cause; the ground being that greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them."

It might also be observed with respect to the case of *White v. Nicholls*, which was an action of libel for defamatory words contained in a petition addressed to the President of the United States, asking for the removal of the plaintiff from the office of collector of customs, that the presentation of a petition of that character did not create an occasion which would generally be regarded as an

absolutely privileged occasion, but merely an occasion which would be qualifiedly privileged. Hence it might be said that it would have been sufficient if the court had merely decided that the occasion in that case was not an absolutely privileged occasion: See subsequent portion of this note for a discussion of the question with respect to judicial proceedings.

V. Who Determines Whether Statement is Privileged.

Whether the publication is or is not privileged by reason of the occasion is a question of law for the court alone, where there is no dispute as to the circumstances under which it was made: *Nichols v. Eaton*, 110 Iowa, 509, 80 Am. St. Rep. 319, 81 N. W. 792, 47 L. R. A. 483; *Sullivan v. Strathan-Hutton-Evans Com. Co.*, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859; *Briggs v. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274, 2 Atl. 513; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775. In *Hamilton v. Eno*, 81 N. Y. 116, it was said that it is for the court to determine whether the subject matter to which the libel relates, the interest of the author in it, or his relations to it, are such as to furnish an excuse, but the question of good faith, belief in the truth of the statement and the existence of actual malice remains for the jury. In this connection see, also, *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 819, 11 S. W. 1058; *Byam v. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. 75, 2 L. R. A. 129, and note to *State v. Syphrett*, 13 Am. St. Rep. 625.

VI. Scope of Privilege.

Judge Taft in *Post Pub. Co. v. Hallam*, 59 Fed. 530, observed that: "The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed." In accordance with this rule it was held in *Tillinghast v. McLeod*, 17 R. I. 208, 21 Atl. 345, that statements made in protection of defendant's interests could not go beyond what is required to protect his interests. So, also, in *Sullivan v. Strathan-Hutton-Evans Com. Co.*, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859, it was held that statements made to protect business interests are privileged only with respect to so much thereof as relates to matters relevant to the business transaction under consideration. In *Merchants' Ins. Co. v. Backner*, 98 Fed. 222, the court held that charges against a third person, not necessary to a statement of defendant's position in regard to the business to which the letter was a reply, were not privileged. But in *Nichols v. Eaton*, 110 Iowa, 509, 80 Am. St. Rep. 319, 81 N. W. 792, 47 L. R. A. 483, the court said that if the occasion was privileged and the statements were about a matter in which both parties have an interest, an excess of privilege is material only

as bearing upon the question of malice in fact and that the jury could find the existence of such malice from the very language itself: See, also, *Neeb v. Hope*, 111 Pa. St. 145, 2 Atl. 568, and *Jackson v. Pittsburgh Times*, 152 Pa. St. 406, 34 Am. St. Rep. 659, 25 Atl. 613.

In *Smith v. Smith*, 73 Mich. 445, 16 Am. St. Rep. 594, 41 N. W. 499, 3 L. R. A. 52, it was held that the privilege attaching to a statement may be lost if the extent of its publication be excessive: See, also, *Buckstaff v. Hicks*, 94 Wis. 34, 59 Am. St. Rep. 853, 68 N. W. 403; *Knapp & Co. v. Campbell*, 14 Tex. Civ. App. 208, 36 S. W. 765; *Hunt v. Bennett*, 19 N. Y. 173. But in *Mertens v. Bee Pub. Co. (Neb.)*, 99 N. W. 847, it was held where a communication is privileged it does not lose its privileged character by incidentally coming to the attention of others than those for whom it was intended.

While a newspaper has the right to publish fair comments and criticisms on matters of public concern, it will not, as a rule, be protected if it goes further than the occasion warrants: *Cooke v. O'Malley*, 109 La. 382, 33 South. 377. And in *Morse v. Times-Republican Ptg. Co. (Iowa)*, 100 N. W. 867, the court observed: "It is well established that it is no defense in this class of cases to show that the defendant's publication was first made by another person or newspaper and was simply copied with proper credit. Such fact, under some circumstances, may be considered in mitigation of damage, if pleaded for that purpose, but is never a bar to plaintiff's action"; citing *McDonald v. Woodruff*, 2 Dill. 244, Fed. Cas. No. 8770; *Atkinson v. Detroit Free Press*, 46 Mich. 341, 9 N. W. 501; *Clarkson v. McCarty*, 5 Blackf. (Ind.) 574; *Hotchkiss v. Oliphant*, 2 Hill, 510; *Sans v. Joeris*, 14 Wis. 663; *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140; *De Crespigny v. Wellesley*, 5 Bing. 392.

VII. Waiver of Privilege.

Where a libelous letter, which was privileged because written concerning church matters of common interest, stated that the addressee might read it to all whom he desired, the writer thereby waives his claim of privilege arising from the occasion: *Coles v. Thompson*, 7 Tex. Civ. App. 666, 27 S. W. 46. In this connection see, also, *Rausch v. Anderson*, 75 Ill. App. 526.

VIII. General Effect Where Statement is Privileged.

Ordinarily, proof of a defamatory publication makes out a *prima facie* case of malice against the author, but the doctrine of privilege operates to change the ordinary rule to the extent that it removes the presumption of malice and makes it incumbent on the party complaining of the publication to show malice. The malice, may, however, as a general rule, be shown by the phraseology of the written matter constituting the libel or by extrinsic facts from which malice may be inferred: *Morse v. Times-Republican Ptg. Co. (Iowa)*,

100 N. W. 867; *Nichols v. Eaton*, 110 Iowa, 509, 80 Am. St. Rep. 319, 81 N. W. 792, 47 L. R. A. 483; *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128; *Lander v. Jones (N. Dak.)*, 101 N. W. 907. In *Conroy v. Pittsburgh Times*, 139 Pa. St. 334, 23 Am. St. Rep. 188, 21 Atl. 154, 11 L. R. A. 725, the court remarked that probably the correct statement of the rule was that where the statement was qualifiedly privileged, there was no *prima facie* presence of malice from the publication.

With respect to cases where the occasion is one which is termed an absolutely privileged occasion, the better rule seems to be that the defendant cannot be held liable regardless of his malice or good faith in publishing the libelous statement: *Runge v. Franklin*, 72 Tex. 585, 13 Am. St. Rep. 833, 10 S. W. 721, 3 L. R. A. 417; *Gardemal v. McWilliams*, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 South. 106. See, also, the discussion of this subject in connection with the effect of malice in subdivision IV. For illustrative cases on the subject, see subdivision X.

IX. Effect Where Statement is a Willful Falsehood.

The principal case (*Holmes v. Clisby*) states the rule to be that a willful falsehood cannot be uttered in good faith, and hence such a statement cannot be the subject of a privileged communication. In *Belknap v. Ball*, 83 Mich. 583, 21 Am. St. Rep. 622, 47 N. W. 674, 11 L. R. A. 72, the court said: "Publication of falsehoods are never privileged. No public interest can be subserved by their publication and circulation. If statements, though false, are published in good faith and with an honest belief in their truth, the damages may be reduced to a minimum." See, also, *Briggs v. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274, 2 Atl. 513, *Mertens v. Bee Pub. Co. (Neb.)*, 99 N. W. 847, and *Smith v. Smith*, 73 Mich. 445, 16 Am. St. Rep. 594, 41 N. W. 499, 3 L. R. A. 52, to the same effect.

X. Application of the Doctrine of Privilege.

a. Statements Relative to Governmental Affairs.

1. Statements by Persons Occupying Official Positions.

A. Members of Judiciary.—The court in *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279, said: "It seems to be settled by the English authorities that judges, counsel, parties and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings: *Henderson v. Broomhead*, 4 Hurl. & N. 569; *Revis v. Smith*, 18 Com. B. 126; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, and cases cited; affirmed in L. R. 7 H. L. 744; *Seaman v. Netherclift*, 1 C. P. Div. 540. The same doctrine is generally held in the American courts, with the qualification, as to parties, counsel and witnesses, that in order to be privileged, their statements made in the course of an action must be pertinent and

material to the case: *White v. Carroll*, 42 N. Y. 161, 1 Am. Rep. 503; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442; *Kidder v. Parkhurst*, 3 Allen, 393; *Hoar v. Woods*, 3 Met. 193." See, also, *Rausch v. Anderson*, 75 Ill. App. 526.

B. Members of Legislative or Executive Departments.—Members of the national and state legislative bodies are generally exempted from liability for statements made by them in their official capacity by constitutional provisions to the effect that "for any speech or debate in either House they shall not be questioned in any other place." Although there are many dicta to the effect that members of legislative bodies are absolutely privileged for libelous statements made by them during the sessions of such legislative bodies, we have not observed many cases in which the question was directly at issue. Naturally from the fact that members of such bodies generally make such derogatory statements in the course of debate or argument, they are not libelous but slanderous statements. The question, however, sometimes arises in connection with committee reports. Perhaps the leading case upholding the constitutional exemption referred to above, is that of *Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189. In connection with the making of slanderous statements under such circumstances it is said that such members cannot take advantage of their official positions to give expression to private slanders against others: See *Callahan v. Ingram*, 122 Mo. 355, 43 Am. St. Rep. 583, 26 S. W. 1020; *McGaw v. Hamilton*, 184 Pa. St. 108, 63 Am. St. Rep. 786, 39 Atl. 4. In the last-cited case, the court observed: "Even in the recognized cases of absolute privilege, it is not enough that the slanderous words were uttered in a legislative hall or a court of justice to establish a claim to absolute immunity. A further reference must be had to the circumstances and to the occasion of the particular occurrence before that question can be determined."

A town is not liable in an action for libel for matter contained in the report of an investigating committee appointed by it. The action of a town when holding a meeting for some specific purpose, and appointing committees to act for it, is in the nature of a legislative capacity and as a political body, and not in any sense as a private or quasi private corporation: *Howland v. Inhabitants of Maynard*, 159 Mass. 434, 38 Am. St. Rep. 445, 34 N. E. 515, 21 L. R. A. 500.

The case of *Howland v. Flood*, 160 Mass. 509, 36 N. E. 482, was a subsequent phase of the libel sued upon in the case last mentioned. In this case the plaintiff sued the individual members of the committee on account of the statements made in their report to the town. The court said: "In making the report the defendants were performing a duty imposed upon them, and were communicating to the voters and taxpayers of the town the results of investigations in which they had an interest, and which they had the right to know

and act upon: *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418. The occasion, therefore, was such as to protect the members of the committee from liability for any statements contained in the report that were made in good faith, without malice, and with reasonable cause to believe them to be true, and which did not go beyond what was fairly required of them in the discharge of their duty. The occasion was not such as to protect them absolutely from liability. There are comparatively few cases in which parties are protected absolutely from liability for statements which turn out to be defamatory. If the report contained anything in excess of the privilege, the members signing it were liable. Whether it did contain anything of that character was a question of fact for the jury." So, also, in *Weber v. Lane*, 99 Mo. App. 69, 82, 71 S. W. 1099, the report of a committee appointed to investigate a complaint of citizens relative to a dramshop was held privileged in absence of actual malice. Likewise in *Lent v. Underhill*, 54 App. Div. 609, 66 N. Y. Supp. 1086, the report of a committee appointed by a vote of a public school meeting to examine the financial report of the board of trustees of the district was held privileged, in the absence of bad faith or actual malice.

It seems that an official report of a city council meeting required to be published by law in the official city paper would be privileged, but if there is no law requiring the publication of such reports or remarks by a person in attendance at such a meeting, the report is not privileged: *Buckstaff v. Hicks*, 94 Wis. 84, 59 Am. St. Rep. 853, 68 N. W. 403. But in *Trebby v. Transcript Pub. Co.*, 74 Minn. 84, 73 Am. St. Rep. 330, 76 N. W. 961, it was held that the publication in the official newspaper of the city of a resolution of the city council denouncing a private citizen for publishing an alleged false report as to the result and effect of a suit brought by him to enjoin payment of certain city bonds is not privileged, for the reason that the charter provided only for the publication of ordinances having some operative force after passage and the resolution was wholly outside the scope of its duty. It seems also that the resolution was published as an item of news.

In *Mauk v. Brandage*, 68 Ohio St. 89, 67 N. E. 152, the publication by a board of health of a preamble to a resolution, which recited that a number of deaths in the village had occurred through the negligence of the attending physician, was held not privileged. A statement in writing by one school trustee, at the request of his associates, of charges against a teacher's integrity as a reason for not re-employing the teacher is qualifiedly privileged: *Henry v. Moberly* (Ind. App.), 51 N. E. 497. See *Rausch v. Anderson*, 75 Ill. App. 526, for a similar holding in an action for slander. So, also, in *Finley v. Steele*, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852, the preferring of written charges by the members of a school board against a

school teacher in response to an inquiry by the school commissioner, to whom complaints had been made, was held qualifiedly privileged.

2. *Petitions or Complaints to Executive Officers.*—"Whether the public statutes of the state shall be changed is a matter of general interest and of common concern, and information given to the governor for the purpose of influencing his action on a bill which has passed the legislature is *prima facie* privileged; but if the communication contains defamatory matter and is unnecessarily published to others, such publication is not privileged": *Woods v. Wiman*, 122 N. Y. 445, 25 N. E. 919. In *Cook v. Hill*, 3 Sand. 341, a memorial addressed to the postmaster general, protesting against the acceptance of a certain bid for the furnishing of supplies to the department, charging the bidder with fraud and collusion with other bidders, was held qualifiedly privileged. And in *Ramsey v. Cheek*, 109 N. C. 270, 17 S. E. 775, a letter to the superintendent of the United States census objecting to a district supervisor was held qualifiedly privileged, but the court said that if the language of the letter tended to show malice on the part of the writer, that it should have been submitted to the jury. So, also, in *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295, a complaint of misconduct on the part of a policeman addressed to the mayor, who had supervision of the policemen, was held privileged. The same rule has been applied to slanderous communications to officers in aid of the detection of crimes: See *Cristman v. Cristman*, 36 Ill. App. 567; *Eames v. Whittaker*, 123 Mass. 342.

b. Statements Made in Judicial Proceedings.

1. *In General.*—In a former part of this note (subdivision IV) we discussed the effect of malice on the question of privilege, and especially with reference to such cases as are thought to come within the protection of an absolute privilege. Although the courts are not quite uniform in their holdings as to whether there is in fact any occasion whatsoever which affords an absolute privilege, save where made so by some statutory or constitutional provision, still it seems that the weight of authority and reason establish the rule that such absolutely privileged occasions do exist. But the courts are so strict about enlarging the circumstances which constitute such an occasion that even these courts which acknowledge the existence of absolutely privileged occasions throw such limitations upon the rule that it very often amounts to a practical denial of such an existence. The principal occasions in which an absolute privilege is claimed are with respect to judicial proceedings. But even where an absolute privilege is conceded, if the occasion be a judicial proceeding, the question may arise as to whether the proceeding itself is a judicial or quasi judicial proceeding, as happened in *Blakelee v. Carroll*, 64 Conn. 223, 49 Atl. 473, 25 L. R. A. 106, which was a suit for slander for words uttered in testifying before a committee

of a board of aldermen in an investigation held by them. The court held that the occasion was not one of absolute privilege though qualifiedly so. In *Gardemal v. McWilliams*, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 South. 106, the court held that an absolute privilege is extended to all who in the discharge of a duty or the honest pursuit of private right are compelled to take part in the administration of justice or in legislation. The court also observed: "In this class of privileged communications, the occasion is an absolute privilege, and the only question is whether the occasion existed and whether the matter complained of was pertinent to the occasion. In judicial proceedings, both criminal and civil, great latitude is allowed parties in the pursuit of private rights, or the prosecution of crimes. Public order necessarily requires this latitude. What, then, is alleged in a judicial proceeding in the effort to enforce a private right is not to be judged by technical rules. The party attempting to enforce his right may be mistaken in his remedy; he may use language which could have been avoided. But after all, the question is one of intent: 'Intent makes the libel in such a case; strong words do not': *Klinck v. Colby*, 46 N. Y. 434, 7 Am. Rep. 360. If the occasion exists on which the privileged communication is made, and the matter is pertinent to the occasion, it supplies an absolute defense, and depends in no respect upon the bona fides of the defendant." In *Lea v. White*, 4 Sneed, 113, 115, the court, in speaking on the subject, said: "The pertinency of the matter to the occasion is that which is meant by probable cause; and probable cause is, in this class of absolutely privileged communications, what bona fides is to the class of constitutionally [conditionally] privileged communications, which we have seen are protected, unless there is malice in fact." In *Forbes v. Johnson*, 11 B. Mon. 48, it was held that words spoken or written in the course of justice, and pertinent to a legal proceeding within the jurisdiction of the tribunal to which they are addressed and to the remedy sought in that tribunal, are not actionable though they be false, "unless the proceedings were resorted to merely for the purpose of conveying the scandal and as a cover for the malice of the party, and not in good faith as a remedy for the assertion of a right or the redress of a wrong," the court citing *Thorn v. Blanchard*, 5 Johns. 521, as sustaining its holding. The qualification made by the Kentucky court to the rule was vigorously assailed in *Runge v. Franklin*, 72 Tex. 585, 13 Am. St. Rep. 833, 10 S. W. 721, 3 L. R. A. 417, as being unsound. It was claimed that it put proceedings of the courts upon the same basis as other conditional privileges, since if it were shown that pleadings were false and malicious, the jury would likely conclude that they were employed as a cover and vehicle of defamation. The court laid down the broad rule that proceedings in civil courts are absolutely privileged, the court saying: "Citizens ought to have the unqualified right to appeal to the civil courts for redress without fear of being called

to answer in damages for libel. Where property is attached upon false charges or where there is a malicious prosecution in a criminal court, the law affords ample remedies for the wrong done, but not by a suit for libel." In the recent case of *Burdette v. Argile*, 94 Ill. App. 171, it was held whatever is said or written in a legal proceeding, pertinent and material to the matter in controversy, is privileged, and no action can be maintained upon it. The court cited *McDavitt v. Boyer*, 169 Ill. 475, 48 N. E. 317; *Union Mut. Life Ins. Co. v. Thomas*, 83 Fed. 803; *McLaughlin v. Cowley*, 131 Mass. 70. In the recent case of *Lander v. Jones* (on rehearing) (N. Dak.), 101 N. W. 917, which was an action for libel, the court said: "It is well settled that 'no action for slander will lie against a witness for what he says or writes in giving evidence in a judicial proceeding, notwithstanding it may be malicious and false. The privilege which exempts a witness from such action is absolute': *Hunkel v. Voneiff*, 69 Md. 179, 9 Am. St. Rep. 413, 14 Atl. 500, 17 Atl. 1056; *Hoar v. Wood*, 3 Met. (Mass.) 193; *Liles v. Gaster*, 42 Ohio St. 631; *Torrey v. Field*, 10 Vt. 353, 413; *Mower v. Watson*, 11 Vt. 536, 34 Am. Dec. 704; *White v. Nichols*, 3 How. (U. S.) 266, 11 L. ed. 591. Even 'words spoken by a witness in a judicial proceeding, concerning a stranger to the suit, which are pertinent to the issues involved and fairly responsive to the question propounded to him are absolutely privileged, notwithstanding actual malice': *Cooley v. Galyon*, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. 607, 60 L. R. A. 139; *Cooper v. Phipps*, 24 Or. 357, 33 Pac. 985, 22 L. R. A. 836; *Blakeslee v. Carroll*, 64 Conn. 228, 29 Atl. 473, 25 L. R. A. 106; *Shinglemeyer v. Wright*, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129; *Hutchinson v. Lewis*, 75 Ind. 55."

In connection with the general discussion of this subject, see *Metcalf v. Times Pub. Co.*, 20 R. I. 674, 78 Am. St. Rep. 900, 40 Atl. 864; *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914; *Shadden v. McElwee*, 86 Tenn. 146, 6 Am. St. Rep. 821, 5 S. W. 602; *Clemmons v. Danforth*, 67 Vt. 625, 48 Am. St. Rep. 842, 32 Atl. 626; *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265; and also see following subdivisions.

2. *Ex Parte Applications, Motions or Affidavits.*—Where assertions in an application to perpetuate testimony to be used to rebut alleged fraudulent claims were immaterial and irrelevant to the issues in the application, they are not privileged: *King v. McKisick*, 126 Fed. 215.

A motion for an order against an attorney to compel him to pay over money collected by him, containing only the essential facts to entitle the plaintiff to the relief asked, is a privileged communication and not libelous: *Hawk v. Evans*, 76 Iowa, 593, 14 Am. St. Rep. 247, 41 N. W. 368.

"The general rule is that an affidavit filed in the course of judicial proceedings is not actionable as libelous if fairly relevant to the is-

me, or responsive to some fact apparently bearing on the issue to which it is directed, assuming, of course, that the court has jurisdiction in the premises. If an irrelevant charge, otherwise libelous, is contained in such an affidavit, it may be the basis of an action for libel, if shown to have been maliciously made, without an honest belief that it was relevant to the issue, based upon reasonable grounds for such belief. The nature of the irrelevant charge itself (with reference to the actual issues in the case wherein it occurs) may sometimes furnish evidence of the want of such belief, but where it does not, the question of affiant's belief in the relevancy of the charge becomes, generally, one of fact, to be determined by the triers of the facts": *Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875. In the case just cited there was an affidavit for security for costs alleging plaintiff to be insolvent; the court held the counter-affidavit alleging the first affidavit to be a "corrupt, voluntary and willful case of false swearing," not sufficiently relevant to be privileged. In *Rall v. Donnelly*, 56 Ill. App. 425, statements derogatory to the character of the applicant for alimony in a divorce suit were used in an affidavit which was used in opposing the application for alimony. The court said: "We are of the opinion that the plea shows the affidavit to be one which the law sanctions, at least as prima facie privileged." An affidavit alleging the prejudice of the judge before whom a case was about to be tried, was held in *Lander v. Jones* (N. Dak.), 101 N. W. 917, to be privileged and to exempt the party making it from liability even if it were both false and malicious.

3. *Pleadings or Briefs.*—The difficulty in determining the limits of absolute privilege with respect to libelous statements in pleadings has resulted in a mass of apparently inharmonious decisions respecting the subject. It seems that the rule in the English courts is very much broader than in the American courts. In the case of *Johnson v. Brown*, 13 W. Va. 71, the court, after a most exhaustive review of both the English and American authorities, came to the conclusion that libelous statements in pleadings could not furnish the basis of a libel suit if the court had jurisdiction of the cause and the statements were pertinent to the suit, even if the statements were libels on persons not parties to the suit, but intimated that the rule might be different if the suit was resorted to merely for the purpose of conveying the scandalous matter and as a cover for the malice of the party making the statements and not in good faith for the assertion of a right or the redress of a wrong. In *Wilson v. Sullivan*, 81 Ga. 243, 7 S. E. 274, the court tersely stated the rule as follows: "All charges, allegations and averments contained in regular pleadings addressed to and filed in a court of competent jurisdiction, which are pertinent and material to the redress or relief sought, whether legally sufficient to obtain it or not, are absolutely privileged. However false and malicious, they are not libel-

ous." The court also observed that this privilege rested upon public policy, and that the remedy for one who had been harassed by a malicious and groundless suit is not by a suit for defamation, but by a suit for prosecuting the suit maliciously and without probable cause. Besides the court remarked the person making false charges would be liable for perjury: See *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937, to the same effect. So, also, in *Abbott v. National Bank*, 20 Wash. 555, 56 Pac. 376, the court held that if allegations in a pleading filed in a court of competent jurisdiction are pertinent and material to the issue, they are absolutely privileged. The court cited the following authorities as sustaining its position, viz.: *Ash v. Zwietsch*, 159 Ill. 455, 42 N. E. 854; *Vogel v. Gruar*, 110 U. S. 311, 4 Sup. Ct. Rep. 12, 28 L. ed. 158; *Hollis v. Meux*, 69 Cal. 625, 58 Am. Rep. 574, 11 Pac. 248; *Link v. Moore*, 84 Hun, 118, 32 N. Y. Supp. 461; *Gains v. Aetna Ins. Co.*, 104 Ky. 695, 47 S. W. 884; *Bartlett v. Christhilf*, 69 Md. 219, 14 Atl. 518; *Runge v. Franklin*, 72 Tex. 585, 13 Am. St. Rep. 833, 10 S. W. 721, 3 L. R. A. 417; *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274; *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753; *Rainbow v. Benson*, 71 Iowa, 301, 32 N. W. 352.

In *Jones v. Brownlee*, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 445, the court followed what it deemed to be the American rule, namely, that defamatory statements made in a pleading in a suit in a court having jurisdiction of the subject matter, if relevant or pertinent to the matter in hand, are absolutely privileged. And the court held that the rule applied when the statements occurred in the answer or cross-bill and referred to a party who was a stranger to the suit. The allegations in this case were in a cross-complaint in a divorce suit and accused the husband with unlawful cohabitation with a party who was a stranger to the record. So, also, in *Sherwood v. Powell*, 61 Minn. 479, 52 Am. St. Rep. 614, 63 N. W. 1103, 29 L. R. A. 153, the court observed: "It seems to be well established in the English courts that counsel, parties, and witnesses are given free rein in pending litigation, and are absolutely exempted from liability to an action for defamatory words spoken or published of a party in the course of legal proceedings. A rule which tolerates and encourages gratuitous, immaterial, and malicious attacks upon a litigant, and excuses and justifies them, simply affords an opportunity for evil-disposed persons to vilify and calumniate, under the guise of an honest effort to secure the proper administration of justice. The doctrine which prevails abroad has not commended itself to the judiciary of this country, and it has been qualified by the American courts so that statements, verbal or written, made in the course of judicial proceedings, must at least be pertinent and material to the case to be privileged: *Hoar v. Wood*, 3 Met. 193. This qualified rule was subsequently approved in *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *McLaughlin v. Cowley*, 127 Mass. 316. See, also,

White v. Nicholls, 3 How. 266, 11 L. ed. 591; Gilbert v. People, 1 Denio, 41, 43 Am. Dec. 646; Hyde v. McCabe, 100 Mo. 412, 13 S. W. 875; Whitney v. Allen, 62 Ill. 472." It was contended in the above case that the privilege was an absolute one, but the Minnesota court said that it could not indorse so broad a rule although the rule was not without support.

In *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, it was contended that the rule of absolute privilege with respect to pleadings did not apply to libelous statements relative to strangers to the record, but the court, after a review of the cases, held that the rule applied to strangers as well as parties to the suit.

Much of the apparent inconsistency of the decisions has arisen through the holdings of the courts when deciding the relevancy or pertinency of the libelous statements to the issues presented in the cause in which they occur. Many of the courts in holding that a particular statement was not pertinent, and hence not under the protection of an absolute privilege, have spoken more with a view to the case in hand than with a view to stating a general rule of law. The great difficulty lies in the application of the rule. Thus in *Graham v. Cass* Circuit Judge, 108 Mich. 425, 66 N. W. 348, a complaint for larceny before a justice of the peace was held privileged. In *McGehee v. Insurance Co.*, 112 Fed. 853, allegations in defendant's pleadings charging the plaintiff, who was suing on an insurance policy, with having intentionally burned the insured property or with having fraudulently overstated its value in his proofs of loss were held absolutely privileged. In *Monroe v. Davis*, 26 Ky. Law Rep. 728, 82 S. W. 450, where a creditor sued an administratrix and her bondsmen to recover the amount of a debt on the ground that there were unadministered assets, an allegation that the bondsmen had converted certain goods belonging to the deceased without paying for them, and that such goods were part of the unadministered assets, was held germane and pertinent to the issue, and hence not sufficient to sustain an action for libel, but the court intimated that if the action had been instituted for the purpose of conveying the scandal, the injured might have had a cause of action. In *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753, a bank sued its cashier upon his bond and alleged that the bank funds had been misappropriated "by collusion with the teller." The teller was not a party to the bond or suit, and there was no issue which called for an investigation of his conduct. The court held that the reference to the teller was not privileged. So, also, in *Grant v. Haynes*, 105 La. 304, 29 South. 708, 54 L. R. A. 930, in an action for services rendered in obtaining subscriptions to the stock of a corporation, a statement in the answer of certain public social wrongs committed by plaintiff but not connected with the services was held not privileged.

By the question whether alleged defamatory matter contained in a pleading was pertinent to the issues in the case is meant whether there was probable cause for including the matter in the pleading: *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950. It seems that where it is fairly debatable whether the libelous statements be relevant or not, the party or counsel making the statements will be given the benefit of the doubt which may fairly exist as to its pertinency: *Johnson v. Brown*, 13 W. Va. 156. The question whether such libelous statements are pertinent is one of law for the court to decide: *Jones v. Brownlee*, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 445; *Johnson v. Brown*, 13 W. Va. 144; *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950.

Statements of inferences drawn from the evidence in judicial proceedings and stated in the argumentative part of a brief are absolutely privileged if material and pertinent: *Sickles v. Kling*, 60 App. Div. 515, 69 N. Y. Supp. 744. The court, in rendering its opinion in the above case, observed: "Advocacy implies argument, so pertinence is made the test of this privilege, which is but the principle of free speech in the administration of justice. This test protects him attacked by the advocate, for it does not prevent redress of accusations made without the facts; it protects, too, the advocate, for it assures to him the play of his reason within the facts. The advocate does not speak mindful of another day when he will be called upon to justify his inferences as if they had been charged as facts or to vindicate his conclusions by the axioms of logic. His conclusion may be lame and impotent, his inferences far-fetched or feeble, but so long as they can be deemed to be possibly pertinent, so long are they protected."

c. Newspaper or Other Accounts of Governmental Affairs.

1. Judicial Proceedings.

A. In General.—The general rules of law with respect to the right of newspapers to publish matter regarding judicial proceedings are set forth in the exhaustive monographic note on "Newspaper Libels" attached to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369; consequently, we shall not state them again except incidentally in our discussion of the cases arising since the writing of that note.

B. Pleadings.—The right to publish the contents of pleadings filed in suits is very often confirmed by statutes in the various states. In a somewhat recent case—that of *Metcalf v. Times Pub. Co.*, 20 B. L. 674, 78 Am. St. Rep. 900, 40 Atl. 864—the court, in discussing the subject, said: "As a publisher of news and items of public importance the press should have the freest scope; but as a scandal-monger, it should be held to the most rigid limitation. If a man has not the right to go around to tell of charges made by one against another, much less should a newspaper have the right to

spread it broadcast and in enduring form. It is necessary to the ends of justice that a party should be allowed to make his charges against another for adjudication, even though they may be of a libelous character, and as such they are privileged, the injured party having a remedy for malicious prosecution when they are made maliciously or without probable cause. But the right of a party to make charges gives no right to others to spread them. When the charges come up for adjudication, however, although their publication may be as harmful and distressing to the person accused as if they had been published before their consideration by a court, a different rule applies. Individual feelings are no longer considered, for the reason, as stated by Judge Holmes (*Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318): 'It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.' " The case of *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318, which was a suit for libel for the publishing of a petition for the disbarment of an attorney before action thereon by the court, contains an exhaustive review of the subject.

But a newspaper has no right to publish mere arbitrary selections from the proceedings or pleadings in the case, consisting of those portions which impute criminal or moral turpitude to or cast ridicule or odium upon the person to whom they refer. Such garbled reports of pleadings are not privileged: *Metcalf v. Times Pub. Co.*, 20 R. I. 674, 78 Am. St. Rep. 900, 40 Atl. 864. In other words, the report of such proceedings or pleading must be a fair and just one: See the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 361 et seq. Thus, in *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401, it was held where a libelous newspaper publication was not a fair report of the petition in a divorce suit in which the plaintiff in the libel suit had been named as co-respondent, but contained additional statements gathered from other sources, it was not privileged, but the court held that where an article of that sort is privileged, the court should apply a liberal rule of construction in determining what is and what is not privileged.

C. Ex Parte or Criminal Proceedings.—The law as announced by both the English and American authorities, with respect to the publication of ex parte applications or affidavits, will be found in the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 363. In the well-considered case of *Metcalf v. Times Pub. Co.*, 20 R. I. 674, 78 Am. St. Rep. 900, 40 Atl. 864, an application made in chambers before a single judge upon an ex parte application for an injunction pendente lite was held such a proceeding in a court as
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would be privileged if the published report of it be fair and full. In *Shields v. Commonwealth*, 21 Ky. Law Rep. 1588, 55 S. W. 881, which, however, was a prosecution for criminal libel, it was held that while an affidavit made by the defendant before a United States commissioner charging a collector of revenue with violation of the civil service law and criticising his official conduct was privileged, still defendant was guilty of libel if he furnished merely the substance of the affidavit to an editor for publication. In *Beiser v. Scripps-McRea Pub. Co.*, 113 Ky. 383, 68 S. W. 457, the court observed that according to the later current authorities, newspapers may publish ex parte proceedings, provided that they do so fairly and impartially, and accordingly it was held in that case that an application to a justice of the peace to be permitted to make an affidavit for the purpose of instituting a prosecution was one step in a judicial proceeding, and therefore though such application be denied, a fair and impartial publication of the charge thus made is privileged. In *Hulbert v. New Nonpareil Co.*, 111 Iowa, 490, 82 N. W. 928, a complaint for seduction was made before a justice of the peace. The newspaper account of the affair stated that the plaintiff in the libel suit was the complaining witness, while the papers on file showed that another party was the complaining witness. The court held that the publication was not privileged on account of not following the record.

D. Court Proceedings.—The general rule with respect to court proceedings is that a fair report of the proceedings of a public trial including the testimony of the witnesses, arguments of counsel and rulings and instructions of the court are qualifiedly privileged. The published report need not be in full, but may be merely a synopsis, provided that it be made fairly and without malicious or unworthy motives. It seems, however, that if the court, deeming the proceedings unfit for publication, should sit with closed doors or enter an order prohibiting the publication, either of the whole or of some part thereof, that a newspaper could not publish an account thereof without being answerable for any libels included in the publication: See the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 362. In the recent case of *Brown v. Providence Telegram Pub. Co. (R. I.)*, 54 Atl. 1061, which was a libel case arising over the account of litigation written up in such a manner as to make it appear that the defendant was financially embarrassed, the court set forth the general rules with respect to such publications. It said: "A newspaper, or an individual who writes for a newspaper, may argue against the conclusions of law announced by the court, or may criticise its methods of procedure with a view to promote the correction of errors or abuses, and great latitude is allowable in such articles, provided that they are founded in truthful statements and proceed from good motives." And continuing, the court observed: "To a fair and true publication of his case, a litigant must

submit. It is only an extension of the publicity of the courtroom itself. But this principle gives neither to a newspaper nor to an individual the right to prejudge a case or misstate it or to hold up to scorn or ridicule, either directly or by natural implication from his language, a party who is pursuing his legal remedies in court.

"If one avails himself of the privilege, which is given for public reasons, to publish a report of court proceedings, he must make such report full, true and fair, at his peril. Tried by these principles, the article complained of in this case is plainly libelous. It relates truthfully enough to certain things that took place in court. It reproduces with substantial accuracy the tenor of the pleadings, and states the history of the litigation which terminated in the issue of an execution and the levy of it upon plaintiff's residence. Most of the facts categorically stated are substantially true; and if this were all, while the reference to cases long ago terminated might be considered a stretch of the news-gatherer's net not required by any public necessity, the article could not be seriously condemned. But every statement of fact is accompanied with comment and inference, and insinuation directly tending to excite ridicule and depreciation of the plaintiff's character. More than this: there are direct statements which assert or clearly imply the plaintiff's inability to meet his pecuniary obligations. . . . The frequent references throughout the article to the plaintiff's connection with an evening paper published in competition with the defendant's journal, as well as the whole tone of the article and its reference to the plaintiff, show that the motive of the publication was to do personal injury to the plaintiff from dislike and ill-will, and not the giving to the public a fair and truthful report of the litigation which is made the occasion of it."

The case of *Metcalf v. Times Pub. Co.*, 20 B. I. 674, 78 Am. St. Rep. 900, 40 Atl. 864, is also an instructive case in this respect. In *Thompson v. Powning*, 15 Nev. 203, Justice Hawley, in delivering the opinion of the court, said: "A fair and impartial account of the proceedings in a court of justice is, as a general rule, a justifiable publication. Proprietors of newspapers are not to be punished for publishing a fair, full and true report of judicial proceedings, except upon actual proof of malice in making the report. The reason for this rule is, that the public have a right to know what takes place in a court of justice, and unless the proceedings are of an immoral, blasphemous, or indecent character, or accompanied with defamatory observations or comments, the publication is privileged." But he also observed: "Preliminary proceedings which are purely ex parte in their nature do not come within this rule because they have a tendency to prejudge those whom the law still presumes to be innocent and to poison the source of justice"; citing *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548, 78 Am. Dec. 285; *Kelley v. Laftte*, 28 La. Ann. 435; *Cooley on Torts*, 210, and authorities there cited. In *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465, it was held

that the reports of judicial proceedings need not be verbatim, but must be substantially correct, and not garbled or partial and made bona fide without malice. So, also, as to the comments accompanying the reports. In *D'Auxy v. Star Co.*, 31 Misc. Rep. 388, 64 N. Y. Supp. 283, it was said that the report of court proceedings which states that the counsel said things which were not said at all, is not such a fair report as is privileged. Likewise in *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596, it was held that the privilege of publishing a fair statement of the proceedings of a municipal court on a complaint against the plaintiff, was not taken away because he was discharged, for the reason that the grand jury found no bill against him, whereas the libelous publication stated that the case was not proessed.

But reports of crime made by injured parties to police officers cannot have the protection of privilege on the theory of being court proceedings: *Jastrzembeki v. Marxhausen*, 120 Mich. 677, 79 N. W. 935. The question whether the report is a fair and true one is for the court: *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465; *D'Auxy v. Star Co.*, 31 Misc. Rep. 388, 64 N. Y. Supp. 283.

2. *Fire or Police Department Records.*—In *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596, it was held that under statutory provisions declaring the fire marshal's record shall be open to public inspection at all times, the record becomes a public one, and that a fair publication of it was qualifiedly privileged.

Reports made by detective officers to their superiors and inscribed in books kept for that purpose are not judicial proceedings, and no privilege attends their publication: *Billet v. Times-Democrat Pub. Co.*, 107 La. 751, 32 South. 17, 58 L. R. A. 62. The same principle was upheld in *Jastrzembeki v. Marxhausen*, 120 Mich. 677, 79 N. W. 935, where a newspaper account, based on a report made to the police department of an alleged crime was held not privileged: See, also, the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 363, relative to ex parte proceedings and affidavits.

3. *Legislative Proceedings.*—Fair reports of legislative bodies are said to be qualifiedly privileged: *Meteye v. Times-Democrat Pub. Co.*, 47 La. Ann. 824, 17 South. 314; *Buckstaff v. Hicks*, 94 Wis. 34, 59 Am. St. Rep. 853, 68 N. W. 403. But it was said in the case last cited that the term "legislative body" has not been extended to cover a city council meeting, though it was said that official report of a city council meeting required by law to be published in the official city paper would be privileged. Hence, it was held in that case that the publication of libelous remarks made at a meeting of the city council by a member of one branch of the state legislature explaining why a proposed municipal charter had not been enacted by such legislature, and accusing a member of another branch of drunkenness, was not privileged, and especially if the newspaper containing such a publication has a general circulation beyond the limits

of the municipality. In *Trebby v. Transcript Pub. Co.*, 74 Minn. 84, 11 Am. St. Rep. 330, 76 N. W. 961, it was held that the publication of a nonofficial resolution of a city council wholly outside of its duty and containing matter libelous per se was not privileged. In *Wallis v. Bassett*, 34 La. Ann. 131, it was held that a publication of the proceedings of a town council in the locality where the paper is published could not be regarded as being in itself malicious and libelous. So, also, in a later case—that of *Metcye v. Times-Democrat Pub. Co.*, 47 La. Ann. 824, 17 South. 314—it was held that an accurate and impartial account of the proceedings of a committee of the common council of the city of New Orleans, which met at the instance of the mayor to investigate charges of mismanagement of the Leper Hospital, was qualifiedly privileged.

4. **Extent of Right to Use Headlines.**—It is generally held that the headlines to an article may be considered as a part of the article itself, and may justify the publication being regarded as libelous when the body of the article is not necessarily so: See the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 247. See, also, *Dorr v. United States*, 195 U. S. 138, 49 L. ed. a prosecution for criminal libel. Where the court held under the Philippine Island statutes, that striking headlines to a newspaper report of a judicial proceeding, which proclaimed the prosecuting witness as a "traitor, seducer and perjurer," were not privileged even if the report itself was. In *Hayes v. Press Co.*, 127 Pa. St. 642, 14 Am. St. Rep. 874, 18 Atl. 331, 5 L. R. A. 643, it was held that the headline "Hotel Proprietors Embarrassed" was not a privileged index to an account, to the effect that a judgment was rendered against the parties in question on a demand note. But in *Lawyers' Co-operative Pub. Co. v. West Pub. Co.*, 32 App. Div. 585, 52 N. Y. Supp. 1120, it was held that headlines affixed to a report of a judicial proceeding were privileged if they are a fair index of the matter contained in the report, but that in determining whether they are a fair index, the headlines and matter contained in the report must be construed together.

4. Statements Concerning Officials or Candidates for Office.

1. **Public Officials.**—With respect to publications concerning public officials, the question always arises whether the alleged libelous statements are merely allowable criticism, or whether they in fact constitute libel. The general principles of law applicable to publications concerning public officials will be found set forth in the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 249 et seq. In *Jackson v. Pittsburgh Times*, 152 Pa. St. 406, 34 Am. St. Rep. 659, 25 Atl. 613, it was said that a public official is amenable to public criticism in a newspaper without liability for libel when there is probable cause for comment and no proof of express malice, even though the statements published are not true in all respects.

So, also, it is said that a fair and reasonable criticism of the acts of an official, made without malice and not containing an attack on his private character, is privileged: *Clifton v. Lange*, 108 Iowa, 472, 79 N. W. 276; *Evening Post Co. v. Richardson*, 113 Ky. 641, 68 S. W. 665. But where the attack consists merely of gibes, taunts and contemptuous language aimed mostly at the personality of the official, it is not a privilege: *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111. So, also, false and groundless imputations of wicked motives or of misconduct are not privileged: *Bee Pub. Co. v. Shields* (Neb.), 94 N. W. 1029; *Martin v. Paine*, 69 Minn. 482, 72 N. W. 450. In *Evening Post Co. v. Richardson*, 113 Ky. 641, 68 S. W. 665, it was held where the charge of corruption of plaintiff as an election officer was sent to the defendant newspaper by a journalist of great experience, prudence and accuracy, and defendant in good faith believed the information to be true, that these facts furnish a basis for a qualified privilege. In *Coffin v. Brown*, 94 Md. 190, 89 Am. St. Rep. 422, 50 Atl. 567, 55 L. B. A. 732, a letter containing libelous charges against a supervisor of election appointed by the governor, written in good faith to the chairman of the opposite political party for the purpose of defeating the re-election of the governor, the publication was not privileged as being in execution of a political duty. And in *Angusta Evening News v. Radford*, 91 Ga. 494, 44 Am. St. Rep. 53, 17 S. E. 612, 20 L. B. A. 533, a willful, malicious and false publication, charging a public official with unbecoming and improper conduct merely to get fees, was held to constitute an unprivileged libel. Likewise in *O'Rourke v. Lewiston etc. Pub. Co.*, 89 Me. 310, 36 Atl. 398, the court observed that newspapers are protected in giving public information as to the conduct of public officials if such information is true or is published honestly and with reasonable cause for believing it to be true. The plaintiff in that case had been charged with cruelty toward an insane pauper. Though the question of privilege does not seem to have urged, it was held in *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 30 South. 625, 55 L. B. A. 214, that it is libelous to impute to one holding an office that he has been guilty of improper conduct in office or has been actuated by wicked, corrupt or selfish motives. So, also, in *Bourreseau v. Detroit etc. Co.*, 63 Mich. 425, 6 Am. St. Rep. 320, 30 N. W. 376, a publication charging plaintiff with having arrested and handcuffed men without right, and of oppressing the poor and friendless under color of his office of deputy sheriff, was held not privileged.

And in *Wood v. Boyle*, 177 Pa. St. 620, 55 Am. St. Rep. 747, 35 Atl. 853, a publication attacking a person in his private individual character was held not privileged by the fact that he occupies an official position and is engaged in public business.

2. **Candidates for Political or Official Positions.**—The general rules regard to newspaper articles concerning candidates for office seem very much the same as those with respect to persons already

in office. It would seem that public officials being merely public servants ought to have their qualifications for the office which they seek discussed in the same manner as a person seeking private employment, with only this difference: that with respect to public employment, the public is entitled to know what is needful in regard to the candidate, whereas in private employment a private individual is entitled to that knowledge. In *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 30 South. 625, 55 L. R. A. 214, it was said that editors have full liberty to criticise the conduct and motives of public men and measures, but the discussion must be fair and legitimate and not asperse the character of public men or ascribe to them base and corrupt motives.

So, also, it is said when one becomes a candidate for public office he thereby deliberately places his conduct, character and utterances before the public for their discussion and consideration. They may be criticised according to the taste of the speaker or writer, and the law will protect him provided that his statements of or reference to the facts upon which their criticisms are based observe an honest regard for the truth: *Belknap v. Ball*, 83 Mich. 583, 21 Am. St. Rep. 622, 47 N. W. 674, 11 L. R. A. 72. See, also, monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 349, 354. The court in *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810, 21 L. R. A. 493, observed: "The rule we gather from the authorities is that the fitness and qualifications of a candidate for an elective office may be a subject for the freest scrutiny and investigation, either by the proprietor of a newspaper or by a voter or other person having an interest in the matter, and that much latitude must be allowed in the publication, for the information of voters, of charges affecting the fitness of a candidate for the place he seeks, so long as it is done honestly and without malice. Nor will such publication be actionable without proof of express malice, although it may be harsh, unjust and unnecessarily severe, for there are matters of opinion of which the party making the publication has a right to judge for himself. In the case of such a publication the occasion rebuts the inference of malice which the law would otherwise raise from its falsity, and no right of action exists, even though the character of the party has suffered, unless he is able to show the existence of actual malice. But when the publication attacks the private character of a candidate, by falsely imputing to him a crime, it is not privileged by the occasion, either absolutely or qualifiedly, but is actionable per se, the law implying malice; and it is no justification that the publication was made with an honest belief in its truth, in good faith, and for the purpose of influencing voters. Such publications can be justified only by proof of their truth: *Commonwealth v. Clapp*, 4 Mass. 163, 3 Am. Dec. 212; *Curtis v. Mussey*, 6 Gray, 261; *Aldrich v. Press Printing Co.*, 9 Minn. 133, 86 Am. Dec. 84; *Root v. King*, 7 Cow. 613; *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102; *Hamilton v. Eno*, 81 N. Y. 116; *Commonwealth v. Wardwell*, 136 Mass. 164; *Barr* v.

Moore, 87 Pa. St. 385, 30 Am. Rep. 367; Seeley v. Blair, Wright, 358. If it can be said that the cases of Bays v. Hunt, 60 Iowa, 251, 14 N. W. 785, Mott v. Dawson, 46 Iowa, 533, and State v. Balch, 31 Kan. 465, 2 Pac. 609, when read in the light of the facts, announce a contrary doctrine, they do not seem to us to be supported either by reason or the weight of authority. To permit a defendant who has published of a candidate false and defamatory statements concerning his private acts and character, on being pursued in the courts for this grievous wrong, to say in justification that he was actuated by no ill-will or malice toward the plaintiff, but his motives were pure and conduct actuated only by a desire for the public good, would abandon candidates to all of the fierce tempests of defamation which either personal spite or political interest may suggest. The only safe evidence of a man's intentions are his acts, and if he accuses another of crime, he must conclusively be presumed to have intended to injure him."

The same general conclusions were also stated in the very recent case of Star Pub. Co. v. Donahoe (Del.), 58 Atl. 513, wherein all of the principal authorities were exhaustively reviewed. In this connection, see, also, Smith v. Burrus, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881, 13 L. R. A. 59. In Boucher v. Clark, 14 S. Dak. 72, 84 N. W. 237, it was held that it was proper for a newspaper to give its readers, who are interested in the fitness of a candidate, such information as it may acquire in good faith, by the exercise of reasonable care, concerning the methods or means employed by the candidate to procure votes, although the publisher may be unable to establish the truth of what is published, provided that he can establish the fact that he acted without actual malice and for the sole purpose of enlightening the electors. And in Myers v. Longstaff, 14 S. Dak. 98, 84 N. W. 233, it was held that an attack on the character of a candidate falsely charging him with a crime not affecting his fitness for the office for which he was running was not privileged.

In Eikhoff v. Gilbert, 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451, a circular addressed to the voters requesting them to vote against a certain candidate for representative "because in the last legislature he championed measures opposed to the moral interests of the community" without stating the measures supported is not privileged, for it is a statement of a libelous fact and affords no opportunity to judge whether it is a proper deduction. The decision was, however, dissented from by two of the judges.

In Coffin v. Brown, 94 Md. 190, 89 Am. St. Rep. 422, 50 Atl. 567, 55 L. R. A. 732, a libelous statement in a letter to the chairman of a state central committee to the effect that the candidate for governor had appointed plaintiff to office, and charging that plaintiff was a man of no moral character and capable of committing any political crime which he might find profitable, was held not privileged as against plaintiff. And in Coogler v. Rhodes, 38 Fla. 240, 56 Am. St.

Rep. 170, 21 South. 109, it was held where a person is a candidate for appointment to public office at the hands of the governor, one who writes to the governor that it is a notorious fact that the candidate runs the only house of prostitution in the town, and that his mistress has been indicted in the courts, is qualifiedly privileged, though not true, if there was reasonable ground to believe it true and it was published in good faith without personal malice.

a. Statements Relative to Matters of Public Interest.

1. **By Persons Individually or Collectively.**—The privilege of a citizen to comment on matters of public interest or relative to the doings of public officers is limited by the condition that he do so fairly and with honest purpose, and that the line be observed where defamation commences and true criticism ends: *Schornberg v. Walker*, 133 Cal. 224, 64 Pac. 290.

An investigation by a college board of trustees of public charges affecting the moral fitness and competency of its president is qualifiedly privileged, and a publication in pamphlet form of the proceedings, including a defamatory speech of the president in his own defense, is likewise so privileged if published for the purpose of laying the whole investigation before the public for their judgment: *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931.

2. By Newspapers or Periodicals.

A. **Rights of Newspapers in General.**—A newspaper is not privileged as such in the dissemination of news, but is liable for what it publishes in the same manner as any other individual: *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. Rep. 318, and note, 43 N. W. 431. In the very recent case of *Morse v. Times-Republican Ptg. Co. (Iowa)*, 100 N. W. 867, the court said: " 'Liberty of the press' has never been held to mean 'that the publisher of a newspaper shall be any less responsible than any other person would be for publishing otherwise the same libelous matter.' The contrary rule has been affirmed by the courts in this country and England with great uniformity: *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676; *Sheckell v. Jackson*, 10 Cush. 25; *Aldrich v. Printing Press Co.*, 9 Minn. (Gil. 123) 138, 86 Am. Dec. 84; *Boot v. King*, 7 Cow. 628; *Tillson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50; *Smart v. Blanchard*, 42 N. H. 137; *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403; *Barr v. Moore*, 87 Pa. St. 385, 30 Am. Rep. 367; *Eviston v. Cramer*, 47 Wis. 659, 3 N. W. 392; *Edwards v. San Jose etc. Soc.*, 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. Rep. 318, 43 N. W. 431; *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810, 21 L. R. A. 493; *Smith v. Tribune Co.*, 4 Bism. 477, Fed. Cas. No. 13,118; *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140; *Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183; *Davis v. Duncan*, 7 El. & B. 231; *Mallory v. Pioneer Press*

Co., 34 Minn. 521, 26 N. W. 904; Delaware etc. Ins. Co. v. Crosdale, 6 Houst. 181; Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605. See, also, exhaustive note by Mr. Freeman, 15 Am. St. Rep. 343." In one of the earliest leading cases—White v. Nicholls, 3 How. (U. S.) 286, 11 L. ed. 600—it was said that newspapers exist in response to a demand of the public for news or for information upon divers subjects, both public and private. And that when one who publishes a libel acts in the bona fide discharge of a public or private duty, legal or moral, he is exonerated from liability unless it appears that he acted with a malicious intent. In the very recent case of Triggs v. Sun etc. Assn., 179 N. Y. 154, 103 Am. St. Rep. 841, 71 N. E. 739, the court observed: "While everyone has a right to comment on matters of public interest, so long as one does so fairly, with an honest purpose, and not intemperately and maliciously, although the publication is made to the general public by means of a newspaper, yet what is privileged is criticism, not other defamatory statements, and if a person takes upon himself to allege matters otherwise actionable, he will not be privileged, however honest his motives, if those allegations are not true. When a publisher goes beyond the limits of fair criticism, his language passes into the region of libel, and the question whether those limits have been transcended may become a question of law, but ordinarily presents a question for the jury."

The use of words of suspicion or the stereotyped expressions "they say" or "it is said" were condemned in Haynes v. Clinton Ptg. Co., 169 Mass. 512, 48 N. E. 275; Johnson v. St. Louis Dispatch Co., 65 Mo. 541, 27 Am. Rep. 293. But in this connection, see, also, Briggs v. Garrett, 111 Pa. St. 417, 56 Am. Rep. 274, 2 Atl. 513. It was also said in Post Pub. Co. v. Hallam, 59 Fed. 536, that reckless publications of sensational articles to increase the sales of the newspapers very strongly indicated a reckless indifference to the rights and reputations of others.

B. Right to Chronicle Current Events.—Proprietors of newspapers are not entitled to claim justification in publishing items of news or detailing occurring events that are libelous, no matter whether furnished by correspondents, reported by other persons, or copied from other newspapers: Thompson v. Powning, 15 Nev. 206. In Gilman v. McClatchy, 111 Cal. 606, 44 Pac. 241, it was argued that a newspaper is a purveyor of news; that the people have the right to read the news; that a story of crime gleaned and published in the ordinary course of newspaper business without personal malevolence against the victim of the tale should be held privileged. But the court held that the details of a libelous statement, gathered by a reporter partly from a prosecuting witness who had arrested a business man upon an affidavit, stating generally that he had committed the crime of rape, without setting forth any of the circumstances of the alleged rape, and based principally upon hearsay of neighbors and general gossip, was neither a privileged report of a judicial

proceeding or of anything said in the course thereof, even though made without express malice, in belief of its truth. So, also, in *Sutton v. A. H. Belo & Co.* (Tex. Civ.), 64 S. W. 686, it was held that the publication of pleadings containing defamatory and scurrilous matter was not privileged when published before trial. In this connection, see subdivision X, c. For a discussion of unchaste, reckless or grossly careless libels by metropolitan journals, without taking the time to investigate their truth, see the monographic note to *Crane v. Bennett*, 101 Am. St. Rep. 758. The case of *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611, was an illustration of a sensational article in regard to cruel treatment of a child which was held not privileged though made in good faith as an item of news. So, also, in *Heyler v. New York etc. Pub. Co.*, 148 N. Y. 734, 42 N. E. 723, affirming 71 Hun, 4, 24 N. Y. Supp. 499, the libelous account charged in effect that plaintiff, who was a married woman, was a single woman, and that she had had a child which she strangled to death. The court held that it constituted neither a defense nor justification for defendant to prove that the charge was made on information obtained from others, or that the article came in as news, and was published without express malice on the part of the newspaper company.

C. Right to Comment on Matters of Public Concern.—In regard to matters of public interest, it is necessary, in order to render such statements privileged, that they be made in good faith, without malice, and to those who have an interest in the subject matter: *Bearce v. Bass*, 88 Me. 521, 51 Am. Rep. 446, 34 Atl. 411. In the case just cited the rule was applied to statements concerning the character of the construction of a public building. In *Cherry v. Des Moines Leader*, 114 Iowa, 298, 89 Am. St. Rep. 365, 86 N. W. 323, 54 L. R. A. 855, it was said that the editor of a newspaper has the right, if not the duty, of publishing for the information of the public, fair and reasonable comments, however severe, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and that such publications fall within the privileged protection for which no action lies without proof of actual malice. The rule was applied in that case to a very ludicrous and sarcastic criticism of a theatrical performance. In *Dowling v. Livingston*, 108 Mich. 321, 62 Am. St. Rep. 702, 66 N. W. 225, 32 L. R. A. 104, it was said that to call a remedy proposed by an author a quack remedy was not libelous. In *Wood v. Boyle*, 177 Pa. St. 620, 55 Am. St. Rep. 747, 35 Atl. 853, a newspaper article directed against a person engaged in a business of a public character and attacking his private, individual and personal character and capacity was held not privileged. In *Morse v. Times-Republican Ptg. Co. (Iowa)*, 100 N. W. 867, an insurance agent was held not such a public character as to make a plea of privilege available for a libelous article in regard to him. In *Cox v. Strickland*, 101 Ga. 482,

28 S. E. 655, the publication of a set of resolutions adopted at a public meeting of citizens denouncing a certain person, stating that they believed him to have been guilty of arson in certain other localities and asking him to remove from the town, was condemned.

f. Statements Affecting Moral or Social Duties.

1. **In General.**—Where one has an interest in the subject matter of the statement, or a duty, even though not of a legal nature, but only of a moral or social character and of imperfect obligation, and there is no impropriety in the publication, it is qualifiedly privileged if made in good faith to one who has a similar duty or interest, or to whom a like propriety attaches to read the statement: *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270. The rule has also been stated that a publication is qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast upon him the duty of making a communication to a certain other person to whom he makes such communication in bona fide performance of such duty, or where the person is so situated that it becomes right, in the interests of society, that he should inform third persons of certain facts which he, bona fide and without malice, proceeds to do: *Coogler v. Rhodes*, 38 Fla. 240, 56 Am. St. Rep. 170, 21 South. 109. See, also, *Pollasky v. Minchener*, 81 Mich. 280, 21 Am. St. Rep. 516, 46 N. W. 5, 9 L. R. A. 102, and *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, and monographic note, to the same general effect. But in *Democrat Pub. Co. v. Jones*, 83 Tex. 302, 18 S. W. 652, it was said that newspapers are not at liberty, under a real or supposed sense of social duty, to publish defamatory articles about individuals.

2. **Communications Between Relatives or Concerning Affiliated Persons.**—In *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866, it was held that a libelous letter written by a son to his mother informing her as to her rights in certain property and the danger of their being lost unless she took some action to protect them was qualifiedly privileged.

In *McBride v. Ledoux*, 111 La. 398, 100 Am. St. Rep. 491, 35 South. 615, it was held in a slander case that if the wife of a half-brother of a woman engaged to be married communicates to the latter's sister a serious charge, which she had heard against the woman's fiancé in order for it to be brought to the attention of the woman's mother to be investigated by her, the communication is privileged. But it was held in "*The Count Joannes*" v. *Bennett*, 5 Allen, 169, 81 Am. Dec. 738, that a letter to a woman, containing libelous charges against her suitor, could not be justified on the ground that the writer was her friend and pastor and was written at the request of her parents. So, also, in *Byan v. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. 75, 2 L. R. A. 129, a similar letter to a woman concerning her suitor was held not privileged by the fact that she, some years before, had requested to be informed of anything the defendant knew "about

any young man she went with, or in fact any young man in the place," if the defendant was not a relative of such young woman and owed no special duty to her.

3. **Later Communication by Writer of Letter of Recommendation.** In *Butterworth v. Conrow*, 1 Marv. (Del.) 361, 41 Atl. 84, Justice Cullen charged the jury to the effect that anyone who has given a letter of recommendation may, if matters coming to his knowledge lead him to suspect the honesty of the person recommended, write to the person with whom employment was obtained on the strength of his former letter that he was mistaken as to the honesty of the person, and that such a letter would be qualifiedly privileged. And in *Fowles v. Bowen*, 30 N. Y. 20, in a slander case, it was held that where a mercantile firm has given one of their clerks a general recommendation, one of the partners who subsequently changes his opinion from facts coming to his knowledge may communicate such changed opinion to the subsequent employer.

4. **Relative to Church Organizations or Their Members.**

A. **Statements Concerning Fellow-members.**—The cases involving statements concerning fellow-members are quite naturally slander cases, but we do not apprehend that a different rule of law would prevail in case such members should put their slanderous statements into written form. It appears that in slander cases the rule is that members of religious societies, when charged with the moral duty of purging its membership of immoral or unworthy members, may communicate information honestly believed to be true concerning the conduct of their fellow-members: *Kersting v. White*, 107 Mo. App. 265, 80 S. W. 730. But such communications are not privileged where no such power of discipline exists: See *Hocks v. Sprangers*, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113; *Lovejoy v. Whitecomb*, 174 Mass. 586, 55 N. E. 322. In both *Farnsworth v. Storrs*, 5 Cush. 412, and *Lendia v. Campbell*, 79 Mo. 433, 49 Am. Rep. 239, the publication of a sentence of excommunication from church membership, made by the pastor was upheld as conditionally privileged.

B. **Statements Concerning Ministers, Pastors or Church Officials.** Church organizations are, in a legal point of view, similar to other voluntary societies, and a member of such an organization is entitled to petition and remonstrate to a spiritual superior with a view to seeking the removal of a minister or priest, provided that there be no want of common honesty in preferring charges as a basis for such removal: *O'Donaghue v. McGovern*, 23 Wend. 26. Or, in other words, the members, deacons or elders of a church are qualifiedly privileged in preferring charges against their minister or pastor when made according to the usage and discipline of the organization: *Fifer v. Woolman*, 43 Neb. 280, 61 N. W. 588.

Where the elders or proper officers of a church, after investigation, find their pastor unworthy or unfit for his office, and in the honest performance of their duty to other members of their denominational

church, publish in church papers the result of their investigation, and there is reasonable ground for such publication, it is qualifiedly privileged, and the fact that it incidentally may be brought to the attention of persons not members of the church organization does not destroy the privilege: *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236. See, also, *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698, in this connection. In *State v. Bienvenn*, 36 La. Ann. 378, which, however, was a criminal prosecution for libel, it was held that although a communication to church authorities concerning a priest may be privileged if made by a church member, still the circulation of a pamphlet, containing libelous charges, outside of such church membership was not privileged.

C. Statements Made at Church Conventions, Conferences or Disciplinary Trials or Investigations.—Every person joining a church impliedly, at least, if not expressly, covenants to conform to the rules of the church and submit to its authority and discipline. Hence proceedings affecting the status of a person's membership in such organizations are qualifiedly privileged: *Landis v. Campbell*, 79 Mo. 433, 49 Am. Rep. 239; *Lucas v. Case*, 9 Bush, 297.

In *Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431, although the court intimated that defamatory charges against a church member by one who was not a member might not be privileged, still if the member consent to be tried on charges so preferred that an action for libel could not be maintained without showing express malice. In *Dial v. Holter*, 6 Ohio St. 228, it appears that the discipline of the church to which both of the parties belonged made it the duty of those who fall out or differ in their secular affairs to have an investigation of the affair by a committee of the church. The main charge made against the alleged erring member was the removal of a cornerstone of lands. The court held that the accusations were qualifiedly privileged.

In *Howard v. Dickie*, 120 Mich. 238, 79 N. W. 191, which was a slander case, a slanderous statement by a member at a quarterly conference of trustees, called for the purpose of electing new trustees, made in answer to inquiries as to why the defendant objected to a certain candidate, were held qualifiedly privileged. So, also, in *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 55 S. W. 805, it was held that the proceedings of a General Baptist convention denying a certain person the rights as a member, published in the usual and ordinary way adopted by that church, were qualifiedly privileged.

D. False Statements in Baptismal Register.—In *Kubricht v. State*, 44 Tex. Cr. 94, 100 Am. St. Rep. 842, 69 S. W. 157, which was a prosecution for criminal libel, it was held if a minister of a church makes an entry upon the church record of the birth and name of a bastard child setting forth the name of the father, after he has been requested not to make such entry, and after knowledge of the trial and acquittal of such reputed father on a charge of seduction of the mother of the child, he is guilty of libel. The defendant had

agreed not to make the entry if the mother would consent, but she would not. It was also contended that the defendant was not guilty because the entry was made in his capacity as a minister pursuant to the custom of his church.

f. Relative to Members of Lodges or Societies.—In *Streety v. Wood*, 15 Barb. 105, the libelous statements arose out of charges preferred by one Odd Fellow against another. The court said: "The acts charged were violations of the rules of the order of Odd Fellows, of which both the parties to the action were members. The charges were addressed to a body having power, under those rules, to receive and investigate them; and if found to be true, apply a remedy; and an equal right to prefer charges appears to have belonged to each member of the order. The case is analogous to that of charges made in a regular course of discipline, between members of the same church, which, it is well settled, are thus privileged: *Jarvis v. Hatheway*, 3 Johns. 180, 3 Am. Dec. 473; *O'Donaghue v. McGovern*, 23 Wend. 26. The presenting substantially the same charges to Osborn, a member of the association, for the purpose of procuring his signature, was, I think, equally privileged."

In *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. St. Rep. 316, the publication in a lodge paper of a statement that a certain person had been expelled from a certain subordinate lodge of Odd Fellows for perjury was held qualifiedly privileged where the publication was made according to the rules and custom of the order. But in *Nix v. Caldwell*, 81 Ky. 293, 50 Am. Rep. 163, it was held that an affidavit by one who was not a Mason, to the effect that another person who was not a Mason could not be believed under oath, was not privileged, although the charge in the affidavit was directed against a person who had testified at a Masonic investigation, and the affidavit was made at the instance of the person on trial at the Masonic investigations and the members of the investigating committee.

In *McKnight v. Hasbrouck*, 17 B. I. 70, 20 Atl. 95, a letter assailing the character of a newly elected honorary member of a medical society written to the secretary by a delegate in bona fide discharge of a duty to inform the society of matters affecting the honor and dignity of the society and the medical profession, was held qualifiedly privileged. And in *Barrows v. Bell*, 7 Gray, 301, 66 Am. Dec. 479, the publication in a medical journal of the proceedings of the Massachusetts Medical Society in expelling a member for a cause within its jurisdiction and of the result of certain suits brought by the expelled member against the society and its members on account of such expulsion, was held privileged.

g. Statements Relative to Personal or Business Affairs.

1. Matters in Self-defense.—A publication which is fairly an answer to a libel and published in good faith for the purpose of repelling the libelous charge is qualifiedly privileged even though false.

In such cases it is for the court to determine whether the occasion is one which justifies the publication but the question of good faith is for the jury: *Brewer v. Chase*, 121 Mich. 526, 80 Am. St. Rep. 527, 80 N. W. 575, 46 L. R. A. 397; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Fish v. St. Louis etc. Pub. Co.*, 102 Mo. App. 6, 74 S. W. 641. In the last case just cited it was said that where the plaintiff had published libelous articles concerning stockholders of defendant, which was a newspaper corporation, and impugned their honesty and conduct as county officials, an article by defendant, not in the nature of a denial or explanation of the previous articles, but an irrelevant attack on the personal and professional character of plaintiff was not a privileged reply. The libelous articles referred to in this case appeared in newspapers and were of the sensational order common to modern journalism. The case of *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803, was also an example of vitriolic newspaper characterizations of the respective parties as parties who were not telling the truth. So, also, in *Smurthwaite v. News Pub. Co.*, 124 Mich. 377, 83 N. W. 116, which was a newspaper war arising out of a discussion of the fitness of certain candidates for office, the court held that where the defendant claims that his publication was provoked and written in self-defense, he must show that his retorts were necessary to his defense or arose out of charges made in the provoking article. The case of *Shepherd v. Baer*, 96 Md. 152, 53 Atl. 790, was an example of a newspaper controversy in regard to the merits of a municipal school board. The court held that defendant's articles did not exceed the bounds of legitimate self-defense. Sometimes the fact that the article is in reply to a previous one is considered more in the nature of being merely in mitigation than in the nature of a privilege: See *Stewart v. Minnesota Tribune Co.*, 41 Minn. 71, 42 N. W. 787; *Hartford v. State*, 96 Ind. 461, 49 Am. Rep. 185; *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1053. See, also, monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 340.

In *Hess v. Gauss*, 90 Mo. App. 439, it was held in a suit against a newspaper proprietor that it is no defense that the libelous matter was composed by another person in reply to certain published criticisms on such person by the plaintiff.

2. Statements in Nature of Information.

A. Voluntary Information.—In *Hollenbeck v. Bistine*, 114 Iowa, 358, 86 N. W. 377, it was held that a letter advising another to discharge a certain employé accompanying his advice with libelous charges was not privileged. And in *Brown v. Vannaman*, 85 Wis. 451, 30 Am. St. Rep. 860, 55 N. W. 183, a letter voluntarily written by one of two rival milk dealers, acting from motives of personal gain to be secured through the injury of his rival, warning a shipper against sending milk and cream to such rival on the ground that he does not pay for them, was held not a privileged statement notwithstanding the writer believed the statement to be true. So, also, in *Davis v.*

Wells, 25 Tex. Civ. App. 155, 60 S. W. 566, the defendant wrote to a certain firm that plaintiff was selling monuments on the representation that the work was to be performed by the firm to whom the letters were addressed, whereas he was in fact having the work done by other firms, and that the work by the other firms was no credit to the addressed firm. The plaintiff was in the employ of the addressed firm soliciting orders for them. The court held the letter was not privileged. The court observed: "The evidence does not disclose any relationship of affinity or consanguinity between the appellee and Rosebrough & Son, nor does it disclose the existence of a friendship between such parties as would rest upon one the moral duty to protect the other; nor does it appear that any fiduciary relationship existed between these parties."

B. Information in Reply to Request.—A person to whom application is made for information may, within the limits thereof, write or speak words which, under other circumstances, would not subject him to a suit for libel or slander, but the scope of the defamatory matter must not exceed the exigency of the occasion, and he cannot take license from the occasion to gratify his malice or state as facts libelous matter which he does not believe to be true: *Alabama etc. Ry. v. Brooks*, 69 Miss. 168, 30 Am. St. Rep. 528, 13 South. 847. The rule was applied in *Rude v. Nasa*, 79 Wis. 321, 24 Am. St. Rep. 717, 48 N. W. 555, under the following circumstances: A man was accused of seduction. A friend of the father of the girl alleged to have been seduced, at the instance of the father, wrote to a clergyman, who had been acquainted with the accused, for an account of his conduct while he knew him. The clergyman gave an account in good faith and without malice. The court held that it was privileged. In *Posnett v. Marble*, 62 Vt. 481, 22 Am. St. Rep. 126, 20 Atl. 813, 11 L. R. A. 162, a statement to a postoffice inspector in reply to his inquiry regarding an applicant for a postal appointment was held qualifiedly privileged. And in *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 261, the court held that where one person seeks information from a third person as to the trustworthiness of an applicant for credit, that the reply is qualifiedly privileged; citing *Ormsby v. Douglass*, 37 N. Y. 477, and *King v. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705, as sustaining the rule.

C. Mercantile Agencies.—A mercantile agency may collect information in regard to persons engaged in trade, and impart to any patron who may especially apply therefor whatever has been learned concerning the business repute or affairs of the person so inquired about, but general publications purporting to disclose the business standing or acts of men, which are circulated among all the patrons of the publisher, and may, therefore, reach persons who may not have any special interest in the business or affairs of the person of whom the statements are made, are not privileged, and if false and defamatory are actionable: See the monographic note to

McAllister v. Detroit Free Press Co., 15 Am. St. Rep. 348 et seq. See, also, *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 76, 9 S. W. 753, 2 L. R. A. 405; *Pollasky v. Minchener*, 81 Mich. 280, 21 Am. St. Rep. 516, 46 N. W. 5, 9 L. R. A. 102. See in this connection, *Johnson v. Bradstreet Co.*, 77 Ga. 172, 4 Am. St. Rep. 77. Thus, a false and voluntary publication by such an agency that a business firm has assigned, sent to all of its subscribers regardless of their location or interest in its affairs, has been held not privileged: *Mitchell v. Bradstreet*, 116 Mo. 226, 38 Am. St. Rep. 592, 22 S. W. 358, 724, 20 L. R. A. 138. So, also, where it departs substantially from the report of its agent and states that plaintiff had made an assignment for benefit of his creditors, whereas it was merely to secure the assignee for indorsing a note, the publication is not privileged: *Douglass v. Daisley*, 114 Fed. 628, 57 L. R. A. 475; and in *Muetze v. Tuteur*, 77 Wis. 236, 20 Am. St. Rep. 115, 46 N. W. 123, 9 L. R. A. 86, a book containing a list of delinquent debtors was held not privileged if published for distribution among members and subscribers, and its manifest purpose is to coerce payment of claims, the name of each delinquent being dropped from the list and the fact of his having made payment announced as soon as made.

D. Statements in Trade or Class Journals.—If a periodical exists for the special purpose of keeping a particular body or class of men informed on a special subject, it may perhaps justify a republication of libelous matter on the ground that to so do is within the duty which it has voluntarily assumed to its patrons: See the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 348. In the very recent case of *Inland Printer Co. v. Economical Half-Tone Supply Co.*, 99 Ill. App. 8, the court said: "The publisher of a trade journal may doubtless make any fair and reasonable discussion of the wares of a merchant or manufacturer who solicits public patronage, and may publish an honest expression of opinion upon the merits of such wares. But, under the guise of expressing an opinion upon such wares, a publisher is not privileged to maliciously make any false statement of any material fact in relation to said wares; nor to maliciously make any false statement of fact which shall impute to such merchant or manufacturer a want of integrity in his business."

E. Statements in Advertisements.—The principal case (*Holmes v. Clisby*, 121 Ga. 244, ante, p. 103, 48 S. E. 934), arose out of the publication of an advertisement by a retailer, the form of which was furnished by the wholesale dealer, to the effect that defendants were their agents for the sale of a certain brand of shoes, and that other dealers selling such shoes in that locality were selling a second quality of such shoes which should be sold as such. The plaintiff had formerly been the agent for that brand of shoes and was closing out his line at reduced prices. The court held that if the advertisement contained only such words as were appropriate and necessary to accomplish the desired end—namely, to place the public

on notice that they were liable to be deceived, and was inserted in good faith in the belief that the statements therein were true—it was privileged, unless it appeared from the publication and the circumstances under which it was made that what was stated in the advertisement, taken in connection with the circumstances, must have been intended to apply to plaintiff, and when so applied could have no other meaning than that he was selling second quality or damaged shoes as perfect shoes, and that defendant knew that the shoes sold by plaintiff were in fact perfect shoes. The case of *St. Louis Clothing Co. v. J. D. Hail Drygoods Co.*, 156 Mo. 393, 56 S. W. 1112, was another instance of rival advertising. The advertisements related to a sale of cloaks bought from the same wholesale dealer. The advertisements contained letters from the wholesale house in connection with other matter showing the reason for the sale at reduced prices. The defendant charged plaintiff's advertisements as being "fakes." Some of the letters in the series appeared to have been garbled, although they were practically true. The question of privilege does not appear to have been discussed. The jury found for the defendant and the appellate court affirmed the judgment.

In *Riley v. Lee*, 88 Ky. 603, 21 Am. St. Rep. 353, 11 S. W. 713, it was held the fact that a libelous card or advertisement in a newspaper was written by a person other than the publisher will not exonerate the publisher from liability. So, also, it is said that where libelous matter is inserted in a newspaper as a paid advertisement, the newspaper publisher cannot justify on that ground: *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655.

A notice or card in a newspaper by a husband notifying the public not to harbor or trust his wife on his credit is qualifiedly privileged to the extent necessary to protect his interests, but not so when it contains words defamatory of the wife: *Smith v. Smith*, 73 Mich. 445, 16 Am. St. Rep. 594, 41 N. W. 499, 3 L. R. A. 52.

F. Statements Made at Instance of Plaintiff.—Much of the matter published in reply to attacks made upon defendant very often is invited by the plaintiff. The rule is stated that where the publication of the libelous matter was procured by the plaintiff with a view to bringing the action for libel, that the publication is privileged: *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656, citing numerous English cases as supporting the rule. The rule appears to obtain in slander cases also: See *Heller v. Howard*, 11 Ill. App. 554; *Haynes v. Leland*, 29 Me. 233; *Irish-American Bank v. Bader*, 59 Minn. 329, 61 N. W. 328; *Nott v. Stoddard*, 38 Vt. 25, 88 Am. Dec. 633.

3. Statements in General Furtherance of Business.

A. Statements to Protect or Enhance Defendant's Business.—The general rule was stated in the principal case (*Holmes v. Clisby*, 121 Ga. 241, ante, p. 103, 48 S. E. 934), that statements published in good faith by one to protect his own interests in a matter where he

is concerned, as well as to protect the interests of another whom he represents as agent, are privileged when the character of the publication is such as to make it reasonably necessary under the circumstances to accomplish the desired purpose. The rule has, of course, been frequently applied. Thus in *Squires v. Wason Mfg. Co.*, 182 Mass. 137, 65 N. E. 32, where defendant had reasonable grounds for claiming to own certain patent rights, its letter relative to that right in response to a letter of inquiry was held qualifiedly privileged. And in *Ginsberg v. Union Surety etc. Co.*, 68 App. Div. 141, 74 N. L. Supp. 561, a letter of a surety company to the parties who had vouched for a collector whom it had bonded, stating that he was a "defaulter," and seeking information as to his whereabouts, was held qualifiedly privileged. In *Caldwell v. Story*, 107 Ky. 10, 52 S. W. 850, 45 L. R. A. 735, an indorsement by a bank cashier on note held by the bank for collection "Never signed a note—fraud—forgery," etc., intending to give reasons assigned by the payor for refusing payment, was held qualifiedly privileged. Likewise in *Ritchie v. Arnold*, 79 Ill. App. 406, a communication by a country banker to a city mercantile house with reference to the pecuniary responsibility of the payor of a note sent him for collection was held qualifiedly privileged. And in *Reusch v. Roanoke Cold Storage Co.*, 91 Va. 534, 22 S. E. 358, a letter asking a hotel company to hold back certain sum owing to the plaintiff because it has assured defendant that it would see his claim paid was held qualifiedly privileged. But in *Hollenbeck v. Ristine*, 114 Iowa, 358, 86 N. W. 377, a letter by a railway surgeon's partner to the railway company stating that one of its conductors was "cowardly, slinking behind the defense of limitations," on a claim for professional services, and advising the company to discharge him, was held not privileged.

B. Letters to Agents or Employé's Relative to Business.—From what has been said in the preceding section it naturally follows that communications between employer and employé are privileged where made in a bona fide manner about something in which the writer has an interest or duty and the addressed party has a similar interest or duty: *Harrison v. Garrett*, 132 N. C. 172, 43 S. E. 592. The rule was applied in *Allen v. Cape Fear etc. Co.*, 100 N. C. 397, 6 S. E. 105, where an order by a railroad company to its agents not to ship lumber or freight to a certain person except when all freight charges were paid and a like order to connecting roads, were held qualifiedly privileged. In *Nichols v. Eaton*, 110 Iowa, 509, 80 Am. St. Rep. 319, 81 N. W. 792, 47 L. R. A. 483, a communication by an insurance company to its soliciting agent charging an examining physician with forgery in an application and informing the agent that another examining physician would be appointed, was held qualifiedly privileged. A like ruling was made in *Rothholz v. Dunkle*, 53 N. J. L. 438, 26 Am. St. Rep. 432, 22 Atl. 193, 13 L. R. A. 655, with respect to a communication by a bank cashier to a stockholder of the bank regarding the financial standing of a surety on an employé's

head. A similar ruling was made in *Scullin v. Harper*, 78 Fed. 460, with respect to a slanderous communication by a stockholder to an officer of the corporation.

C. Notice of Patent or Copyright Infringement Suits.—A signed notice in a trade journal by one engaged in unhairing furs that he has commenced suits against one employed in a similar business for infringing patents used in his business, and that his patents have been sustained by certain courts, and that further infringements by the defendant in his suit and his customers will be prosecuted, is privileged where the facts stated are true: *Bowsky v. Cimiotti Unhairing Co.*, 72 App. Div. 172, 76 N. Y. Supp. 465.

In *Lawyers' Co-operative Pub. Co. v. West Pub. Co.*, 32 App. Div. 585, 52 N. Y. Supp. 1120, the defendant published certain headlines in connection with a statement of a decision of the courts with respect to a suit for violation of copyright, the court said: "The defendant, having a legal interest in its copyrighted publications, had the right to publish to its customers a true statement of the decision of the United States circuit court of appeals, even though it censured the acts of the plaintiff in publishing its General Digest, and the defendant is not liable for publishing a fair report of such decision: *Edsall v. Brooks*, 2 Robt. 29; 8 C., 17 Abb. Pr. 221, 26 How. Pr. 426; *Salisbury v. Union etc. Co.*, 45 Hun, 120; *Townshend on Slander and Libel*, 4th ed., secs. 229, 240; *Starkie on Slander and Libel*, 3d Eng. ed., 214, 281; *Odgers on Slander and Libel*, 2d Eng. ed., 229, 248; 13 Am. & Eng. Ency. of Law, 319, 423. This is the rule of the common law, and is quite independent of section 1907 of the Code of Civil Procedure, which relates to newspapers."

D. Notice of Discharge of Employees.—In *Hatch v. Lane*, 105 Mass. 394, a baker, employing several drivers for delivering bread in several adjacent towns, published a notice in a newspaper in one of the towns that plaintiff "having left my employ and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business." The court held that the defendant was entitled to his benefit of his plea of privilege. In *St. Louis etc. Co. v. McArthur*, 31 Tex. Civ. App. 205, 72 S. W. 76, the defendant published in a newspaper a statement to the effect that it understood that two persons, who were named, were representing themselves to be its special advertising agents, but that they had no connection with the defendant. The court held that the statement was not absolutely privileged, and that as to whether it was qualifiedly privileged "among other considerations depended upon whether it was made either upon express malice or in bad faith. If made in bad faith, though not upon express malice, it was not a privileged communication."

But in *Warner v. Clark*, 45 La. Ann. 863, 13 South. 203, 21 L. R. A. 502, a circular letter sent out by a wholesale firm stating that a certain person who had been a soliciting agent is no longer in the

employ, and that "our friends and customers will kindly note the above and give Mr. W. no recognition on our account," was held not privileged. The opinion, however, seems to be based on the theory that the notice conveyed an insinuation that the defendant was dishonest. The decision in *Daniel v. New York News Pub. Co.*, 21 N. Y. Supp. 862, affirmed in 67 Hun, 649, 142 N. Y. 660, 37 N. E. 569 (in memoranda decisions), was based on somewhat the same idea as that in the last case cited. In the New York case the publication of a notice in defendant's newspaper that plaintiff "is reported as soliciting advertisements for this paper. He has no account and no authority to represent the 'News.' Any such statement on his part is fraudulent, deceptive and for dishonest and malicious purposes," was held not to be a privileged communication. A later case in New York is more satisfactory in its rendition of a decision. In *Ratzel v. New York News Pub. Co.*, 67 App. Div. 598, 73 N. Y. Supp. 849, the defendant published in its newspaper that plaintiff "is no longer in the employ of the News Publishing Company, and has no connection whatever with the 'Daily News.' " The court said: "An employer has a right to publish a notice that a given individual has severed his connection with him and is no longer in his employ without incurring liability therefor. Such a communication is not only privileged, but is the statement of a fact, and in no view is it libelous. He has the same right to notify his patrons that he has dispensed with the services of an employé and state reasons therefor. Such communication is also privileged."

E. Cards, Lists or Communications Showing Cause of Dismissal of Employés.—A railway company having reason to believe that a discharged employé seeking an important position in the railway service is incompetent, careless or otherwise unfit is under obligation to communicate its knowledge or belief to all who are likely to employ him in such service, and if the communication is published in good faith, it is privileged: *Missouri Pac. Ry. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555, 4 L. R. A. 280. In this connection, see, also, *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128; *Brown v. Norfolk etc. Co.*, 100 Va. 619, 42 S. E. 664, 60 L. R. A. 472; *Wabash Ry. Co. v. Young*, 162 Ind. 102, 69 N. E. 1003; *Bacon v. Michigan etc. Co.*, 66 Mich. 166, 33 N. W. 181. In *Fresh v. Cutter*, 73 Md. 87, 25 Am. St. Rep. 575, 20 Atl. 774, 10 L. R. A. 67, it was held in a slander case that a former employer may inform an employer who is about to employ plaintiff that plaintiff had stolen from him, and that the communication was privileged if made in good faith under an honest belief of its truth.

F. List of Nonpaying Debtors.—In *Trapp v. Du Bois*, 76 App. 1, 78 N. Y. Supp. 505, there was a dispute as to eleven dollars hundred and eleven dollar bill for plumber supplies. The defendant paid the one hundred dollars on the bill, but refused to pay

the balance on the ground that he was not legally responsible, and suggested that he be sued for it. Defendant wrote to the Plumbers' Material Protective Association, who blacklisted, or, as was said by the defendant, placed on the "Cash before delivery list" of the association. It was the custom of the association, under its by-laws, to blacklist plumbers who "unjustly failed to meet their obligations." The court held that the evidence warranted a finding of express malice. But in *Reynolds v. Plumbers' Material Pro. Assn.*, 30 Misc. Rep. 709, 63 N. Y. Supp. 303, 53 App. Div. 650, 66 N. Y. Supp. 1142, 169 N. Y. 614, 62 N. E. 1100, a rule of law was announced under a less severe state of facts. Defendant was an association of merchants incorporated to furnish information to its members of the standing and character of their customers. Plaintiff refused to pay his account to one of the members or submit to arbitration as provided by the by-laws, and his name was entered on the books of the defendant association as not having paid his account, and each member of the association was notified, thereby preventing the plaintiff from purchasing goods from members of the association except for cash. The court held that the notification to the members was qualifiedly privileged. But in *Traynor v. Sialaff*, 62 Minn. 420, 64 N. W. 915, the court, under somewhat similar circumstances, held a circular of a merchants' protective association to be not privileged. The plaintiff's name was printed in a circular known as a "black" or "dead-beat" list.

HARTNETT v. STILLWELL.

[121 Ga. 386, 49 S. E. 276.]

PARTNERSHIP—Real Estate of.—The legal title to real estate acquired by purchase with partnership assets, whether taken in the names of the partners individually or in that of the partnership, is in the partners as cotenants, but the equitable title is in the partnership and is treated as personalty, and on the death of one of the partners, the survivor may sell the entire equitable interest in the land, and the purchaser may compel a conveyance from the heirs of the deceased partner. (pp. 153, 154.)

PARTNERSHIP—Real Estate of—Administrator's Sale of.—A purchaser at an administrator's sale of a deceased partner's interest in real estate, the title to which is in the partnership name, acquires only the interest of the intestate in the land, on a settlement of the partnership affairs. The proceeds of such sale belong to the estate of the deceased partner, and are no part of the assets of the partnership. (p. 154.)

PARTNERSHIP—Real Estate of, Administrator's Sale of.—If title to land is taken in the individual names of the partners, an innocent purchaser at an administrator's sale of a deceased partner's interest takes it unencumbered by the secret equity of the

partnership, but the proceeds of the sale may be recovered from the administrator by the surviving partner, if necessary to pay firm debts. (p. 155.)

PARTNERSHIP—Real Estate of—Administrator's Sale of—Purchase by Surviving Partner.—If title to land is taken in the individual names of the partners, and the surviving partner becomes the purchaser at an administrator's sale of his deceased partner's interest therein, the purchaser is estopped from claiming the proceeds of the sale as partnership assets with which to pay firm debts. (p. 155.)

R. T. Daniel, for the plaintiff.

T. E. Patterson and L. Cleveland, for the defendant.

³⁸⁷ EVANS, J. W. H. Hartnett sued John F. Stillwell, as administrator of J. D. George, to recover five hundred dollars alleged to be due by reason of the following facts: Petitioner and J. D. George composed the firm of George & Hartnett. Among the assets of the firm were two lots of land in the city of Griffin, one known as the White place and the other being a vacant lot on Solomon street. George died, and Stillwell became his administrator, and, as such, sold a one-half interest in the White place and the vacant lot, as belonging to his intestate, and collected the proceeds, amounting to four hundred and fifty-five dollars and ninety cents. The firm was insolvent at the time of George's death, and the firm assets in the hands of petitioner as surviving partner are insufficient to pay the partnership debts. The proceeds of the property sold by Stillwell as administrator of the deceased partner should be paid over to petitioner to be applied to the payment of debts of the firm. The defendant in his plea denied the substantial averments of the petition; and the case was referred to an auditor. When the case came on to be heard before the auditor, the defendant filed a demurrer to the petition and moved to dismiss the same, because no cause of action was set out. The demurrer was sustained by the auditor, and he so reported. Afterward evidence was submitted before the auditor, and the uncontradicted evidence established the following facts: George and Hartnett were partners, doing a general merchandise business, and in the course of their business purchased a house and lot from W. R. and M. J. White, paying therefor with partnership assets and procuring the deed to be made to ³⁸⁸ John D. George and W. H. Hartnett. They also purchased a vacant lot on Solomon street from A. M. Elledge and paid therefor with partnership funds, the deed to the last-mentioned lot being made to George & Hartnett. John D. George died, and Stillwell became his administrator. At the time of the death of

George the firm was insolvent. All of the firm assets were exhausted in the payment of partnership debts. Stillwell, as the administrator of George, sold a one-half interest in the vacant lot to Dr. Drewry for one hundred and seventy-six dollars and seventy cents, and a one-half interest in the White place to W. H. Hartnett for two hundred and seventy-six dollars. These amounts were insufficient to pay the debts of the firm of George & Hartnett. Upon these facts the auditor found that the plaintiff had no lien, in law or equity, on the money or proceeds in the hands of the administrator, arising from the sale of the real estate, and that he was not entitled to recover. The plaintiff filed various exceptions to the rulings of the auditor, which were overruled by the court, and the report of the auditor was made the judgment of the court. He excepts to the judgment of the court dismissing his exceptions to the auditor's report. It is not necessary to notice the various exceptions to the auditor's report, and for this reason they are omitted. The question raised by the demurrer and the conclusion of fact by the auditor are identical. The evidence sustained the petition, so that the controlling question in the case is the right of the plaintiff to recover on the case he made.

The plaintiff's theory is that a surviving partner has a lien on the fund in the hands of an administrator of a deceased partner, arising from a sale by the administrator of the interest of the deceased partner in partnership property. Under the undisputed facts as found by the auditor, the plaintiff neither had a lien on the proceeds of the sale of the deceased partner's interest in the lands sold by his administrator, nor was the plaintiff entitled to recover such proceeds on any legal or equitable ground. Real estate received in payment of a partnership debt, whether the title be taken to the individuals composing the partnership or to the partnership, is to be considered at law as the property of the partners as tenants in common, subject, however, to be sold and the proceeds thereof brought into the partnership fund for the payment of partnership debts and the settlement of balances as between the partners: *Burnside v. Merrick*, 4 Met. (Mass.) 537; *Dyer v. Clark*, 5 Met. (Mass.) 562, 39 Am. Dec. 697; *Moran v. Palmer*, 13 Mich. 377; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305; *Collumb v. Read*, 24 N. Y. 505; *Putnam v. Dobbins*, 38 Ill. 394. The legal title to the real estate acquired by purchase with partnership assets is in the partners as tenants in common, but the equitable title in the real estate thus acquired is in the partnership: *Bank of Southwestern*:

Georgia v. McGarrah, 120 Ga. 944, 48 S. E. 393. This equitable title is treated as personalty, and, on the death of one of the partners, the survivor may sell and dispose of the entire equitable interest in the land, and the purchaser may compel a conveyance from the heirs of the deceased partner: Civ. Code, sec. 2649. The administrator of the deceased partner has an inferior right to the surviving partner to the possession and control of partnership real estate. A surviving partner has the right to the control and possession of the property of the firm, and the administrator or heirs of the deceased partner can claim only such of the partnership property as remains after the partnership debts are all paid: *Valentine v. Wysor*, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788, and citations. When the administrator of the deceased partner administered on the interest of his intestate and sold that interest, the purchaser acquired only the title which the administrator's intestate had. The doctrine of caveat emptor applies to administrator's sales, and purchasers at such sales acquire the intestate's title cum onere. This title was the interest of his intestate in the land on a settlement of the partnership affairs: *Dickenson v. Moore*, 117 Ga. 887, 45 S. E. 240. The proceeds of the sale represent the partner's individual interest in the land, and that interest, as we have seen, was the legal title, subject to the sale of the land, if necessary, to discharge partnership obligations. It follows, therefore, that as to the vacant tract of land conveyed to the partnership as such, the surviving partner may, in a proper proceeding instituted against the purchaser at the administrator's sale, subject that tract to the payment of partnership debts. The deed to this vacant lot was taken in the name of the partnership, and when the administrator of the deceased partner undertook to sell his intestate's interest therein, the purchaser was chargeable with notice of the partnership character of the land. His title would be for no greater interest in the land than was owned by the administrator's intestate. Upon proof that the land so purchased was necessary to pay partnership liabilities, the surviving partner ³²⁰ could subject it to the payment of firm debts. All the purchaser acquired at this sale was the interest of the deceased partner, and that interest was what remained to John D. George after a settlement of the liabilities of George & Hartnett. The proceeds of the sale belong to the estate of the deceased partner and are no part of the assets of the partnership.

The title to the White lot was taken to the members of the partnership in their individual names as tenants in common.

The deed did not disclose that it was partnership property or that it was purchased with partnership funds. An innocent purchaser at the administrator's sale would have acquired a good title as against the surviving partner, because the doctrine of caveat emptor does not extend to secret equities. Thus it was held in *Johnson v. Equitable etc. Co.*, 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933, that "a bona fide purchaser at a sheriff's sale, who has paid the purchase money without notice of an equity, will be protected against the same." If the purchaser of the White lot had been an innocent purchaser without notice of the partnership claim on the land, the purchase money would be substituted for the land, and the administrator of the deceased partner would be liable to account to the surviving partner for the same. But the record discloses that the surviving partner was himself the purchaser. He was charged with knowledge of the nature of the title and the interest the partnership had in the land, and, by suffering it to be sold as the property of his deceased partner's estate and becoming the purchaser at that sale, he is estopped from now claiming the proceeds as partnership property.

There being no conflict in the evidence, the conclusion of the auditor that the plaintiff was not entitled to recover was right, and the court did not err in dismissing the exceptions to his report and making the report the judgment of the court.

Judgment affirmed.

All the justices concur.

Partnership Real Estate and its liability for the demands of creditors are discussed in the monographic notes to *Page v. Thomas*, 54 Am. Rep. 792-800; *Goldthwaite v. Janney*, 48 Am. St. Rep. 62-77. See, too, the recent case of *Cundey v. Hall*, 208 Pa. St. 335, 101 Am. St. Rep. 938. Partnership realty is partnership property only so far as it may be necessary for the payment of the debts and the adjustment of the assets of the partnership. The legal title remains in the partners as tenants in common, and when no longer needed for partnership purposes, it is relieved from the trust growing out of the partnership relation: *Adams v. Church*, 42 Or. 270, 95 Am. St. Rep. 740, and see the cases cited in the cross-reference note thereto.

MARIETTA CHAIR COMPANY v. HENDERSON.

[121 Ga. 399, 49 S. E. 312.]

MUNICIPAL CORPORATIONS—Vacating Streets—Legislative Power.—The law-making power of the state has plenary authority in reference to public streets, and may declare an existing street vacated without providing for the submission of the question to judicial inquiry. (p. 157.)

MUNICIPAL CORPORATIONS—Vacating Streets—Delegation of Power.—The power to vacate an existing street may be delegated by the law-making power to a municipal or other subordinate public corporation. (p. 157.)

MUNICIPAL CORPORATIONS—Rights in Vacated Streets.—If a street has been vacated, the interest of the public therein ceases, and the burden upon the land which has been used as a street is removed, and the owner of the fee again becomes entitled to use his property in such manner as he sees proper, without regard to the former servitude to which it was subject. (p. 157.)

MUNICIPAL CORPORATIONS—Vacating Streets—Reverting of Fee.—Whenever a street is vacated, it is presumed that the fee is in the adjacent land owners, and that the right of each extends to the middle of the way. (p. 157.)

MUNICIPAL CORPORATIONS—Vacating Streets—Damages. A property owner damaged by the closing of a street under legislative authority waives his right to demand compensation as a condition precedent to the closing of the street by allowing it to be closed without instituting proceedings to prevent it, and is remitted to his action at law for damages. (p. 159.)

MUNICIPAL CORPORATIONS.—Public Streets cannot be Vacated for the benefit of a private individual, but only for the benefit of the public. (p. 160.)

MUNICIPAL CORPORATIONS—Vacating Streets—Compensation.—A statute authorizing the closing of a public street need not provide for the payment of compensation for property thereby taken or damaged, when the general law of the state provides a method for ascertaining the compensation to be made in such case. (p. 161.)

JUDGMENTS—Vacating.—If a judgment has been entered requiring the removal of an obstruction in a public street, and subsequently a state of facts arises which renders the maintenance of such obstruction lawful, an order declaring such judgment no longer binding and effective should be granted. (p. 163.)

N. A. Morris and King, Spaulding & Little, for the plaintiff in error.

J. Z. Foster, for the defendant in error.

403 COBB, J. 1-4. In the absence of constitutional limitations the law-making power of the state is vested with plenary authority in reference to the public streets and highways. It

may declare an existing street vacated without providing for the submission of the question to judicial inquiry. All questions necessary to be determined in order to decide whether a street shall be vacated or abandoned and the interest of the public therein released, are referred to the wisdom and discretion of the law-making power: *McGee's Appeal*, 114 Pa. St. 470, 8 Atl. 237; *State v. Huggins*, 47 Ind. 586. In the absence of a constitutional restriction, the power to vacate a street may be delegated by the law-making body to municipal and other subordinate public corporations: *Polack v. Trustees*, 48 Cal. 490; *Brook v. Horton*, 68 Cal. 554, 10 Pac. 204. A municipal corporation has no power, in the absence of express legislative authority, to authorize the erection of permanent structures in a public street, which interfere with the free use of such street by the public: *Savannah Ry. Co. v. Woodruff*, 86 Ga. 96, 13 S. E. 156, and citations; *Almand v. Atlanta etc. St. Ry. Co.*, 108 Ga. 424, 34 S. E. 6, and citations; 27 Am. & Eng. Ency. of Law, 2d ed., 113. It necessarily follows that the power to entirely vacate a street does not rest in the municipal authorities, ⁴⁰⁴ in the absence of an express delegation of authority by the general assembly. When a street has been vacated, either directly by an act of the general assembly, or by action of a municipal corporation under the authority of an express delegation of power, the interest of the public in the street ceases, the burden upon the land which has been used as a street is removed, and the owner of the fee again becomes entitled to use his property in such manner as he may see proper, without regard to the former servitude to which it was subject. If the fee in the street was in the state, or in the city, the vacating of the street leaves the state or the municipality, as the case may be, in the possession of the property, to use it for any purpose that it may see proper, without reference to its former use. If the fee to the street is in the adjacent land owners, then the street, relieved of any right in favor of the public, becomes again subject to use by the abutting owners, without reference to the former rights of the public. Whenever a street is vacated, the presumption is, until the contrary appears, that the fee is in the adjacent land owners and that the right of each extends to the middle of the way: *Harrison v. Augusta Factory*, 73 Ga. 447, and citations.

It is contended that though the general assembly may have authority to vacate a street by direct enactment, or to authorize its vacation by the municipal authorities, when in the exercise of this power the adjacent land owner is damaged by the loss of the

right to use the land as a street, such owner must be compensated in damages for this loss. The constitution declares that private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid: Civ. Code, sec. 5729. It has been held that the vacating of a street is neither a taking nor a damaging of private property in such a sense as to authorize the adjacent land owner or others who have been accustomed to use the street to claim compensation for the deprivation of this right; that any loss resulting from the exercise of the power to vacate a street is *damnum absque injuria*: *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649; *Levee Dist. No. 9 v. Farmer*, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; *Coster v. Albany*, 43 N. Y. 399; *Gray v. Iowa Land Co.*, 26 Iowa 387. But there is also authority for the proposition, that when the vacating of the street occasions to the adjacent owner or others who have been accustomed to use the street such peculiar ⁴⁰⁵ loss as is not of the same character as that inflicted upon the general public, equity will interfere in behalf of such owner to restrain the attempted abandonment of the street, and that such person will have a right of action against a municipal corporation which has exercised a power to vacate delegated to it by the state: *Heller v. Atchison etc. R. R. Co.*, 28 Kan. 625; *Horton v. Williams*, 99 Mich. 423, 58 N. W. 369; *Brady v. Skinkle*, 40 Iowa, 576. It has also been said that if the vacating of the street has the effect to entirely destroy or seriously impair the right of ingress and egress of a person owning property approached from the street, the loss thus sustained is not one suffered in common with the general public, and that such person would be entitled to compensation: *Chicago v. Union Bldg. Assn.*, 102 Ill. 379, 40 Am. Rep. 598; *Mills on Eminent Domain*, 2d ed., sec. 318; *Chicago v. Burcky* 158 Ill. 103, 49 Am. St. Rep. 142, 42 N. E. 179, 29 L. R. A. 568. On the other hand, it has been held that the destruction of one means of access, when another is left unimpaired, will not give a right of action against a city which has proceeded to vacate a street in the manner authorized by law: *Smith v. Boston*, 7 Cush. 254; *Fearing v. Irwin*, 55 N. Y. 486; *Kings Co. Fire Ins. Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353.

There are judges of distinguished reputation and courts of high respectability holding that the owners of property abutting upon a street have such a property in the use of the street as that the same cannot be destroyed by vacating the street without compensation being made for the loss sustained: *Van Witsen v.*

Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 433; Webster v. Lowell, 142 Mass. 326, 8 N. E. 54; Haynes v. Thomas 7 Ind. 38; Heinrich v. St. Louis, 125 Mo. 424, 46 Am. St. Rep. 490, 28 S. W. 626; Bannon v. Rohmeiser, 90 Ky. 48, 29 Am. St. Rep. 355, 13 S. W. 444; Lindsay v. Omaha, 30 Neb. 512, 27 Am. St. Rep. 415, 46 N. W. 627; Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307; Cook v. Quick, 127 Ind. 477, 26 N. E. 1007; Pearsall v. Supervisors, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193. See, also, 27 Am. & Eng. Ency. of Law, 2d ed., 115. In this state it has been held that the erection of a permanent structure in a street, which may have the effect to entirely destroy or seriously impair an existing means of access to the property of an abutting owner, is not a "taking" of private property within the meaning of the constitution: Hurt v. Atlanta, 100 Ga. 274, 28 S. E. 65. But in the same case it was also held that this was a damaging of the adjacent property in such a way as ⁴⁰⁶ would entitle the owner to compensation; but that as the effect of the structure, which was a bridge constructed under authority of law, was such as to increase the market value of the adjacent property to such an extent that the enhancement in value equaled or exceeded the damages sustained, no recovery was permitted: See, in this connection, Austin v. Augusta Terminal Ry. Co., 108 Ga. 680, 34 S. E. 852, 47 L. R. A. 755.

The act of 1903, which confirmed the action of the mayor and council in vacating Hansell street in the city of Marietta, and authorized the municipal authorities to complete the act of vacation by relinquishing to the adjacent owners the interest of the public in the street, was valid in every respect; and the Marietta Chair Company is, and has been, at least since the date of the execution and delivery of the deed from the city, possessed of every right of property which it or its predecessors in title had in that portion of the street which was originally taken from their property, and the right of the public therein for all purposes has become completely extinguished. If Henderson, the abutting owner on the opposite side of the street, and now the complete owner of the half of the street abutting upon his property, ever had any right to demand that compensation should be first paid him before the rights of the public in the street were surrendered, for loss of any character sustained by him, he has waived that right by allowing the vacation and abandonment of the street to become complete without resorting to the courts for appropriate relief. If he ever had the right to demand of the municipality

compensation for any loss sustained by him, as a condition precedent to the closing of the street, he should have applied for an injunction before the passage of the resolution carrying into effect the legislative act, or at least before the deeds were executed which that act provided for. If he has any right to damages at all, he is remitted now to an action at law against the municipality; but on this question we now make no authoritative ruling, for the question is not before us in such a manner as either to authorize or require a ruling upon the subject. If he has such a right of action, nothing in the judgment now rendered will preclude him from asserting this right hereafter.

It is contended, however, that the original resolution of the mayor and council, the legislative act, the resolution passed subsequently ⁴⁰⁷ thereto by the mayor and council, and the deeds executed thereunder are all merely component parts of a fraudulent and collusive scheme entered into by the Marietta Chair Company and the municipal authorities to destroy the rights of the public in the street, in order that a private use of the Marietta Chair Company might be subserved. That private property cannot be taken for a private use is a rule of practically universal application, the taking of private property for a private way being apparently the single exception. The use of public property for private use is generally, if not always, an abuse of power by those who are the custodians of the rights of the public: See *Mayor of Macon v. Harris*, 73 Ga. 428; *Van Witsen v. Gutman* 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403. There is nothing in the record in this case that would justify a holding that there was any such scheme, even if the courts have authority to inquire into the motives of the general assembly in passing an act of the character here involved, or into the question whether the general assembly was imposed upon by those interested in the passage of the act. There is nothing on the face of the act or the resolutions which suggests such a scheme, all indicating merely action by the public authorities adopted for the public benefit. The presumption is that this was the case; and even if this presumption could under any circumstances be rebutted by proof, there is no proof to overcome it in the present case.

Neither the general assembly nor a subordinate public corporation acting under its authority can lawfully vacate a public street or highway for the benefit of a private individual. The street or highway cannot be vacated unless it is for the benefit of the public that such action should be taken. The benefit may

be either in relieving the public from the charge of maintaining a street or highway that is no longer useful or convenient to the public, or by laying out a new street or road in its place which will be more useful and convenient to the public in general. If the public interest is not the motive which prompts the vacation of the street whether partial or entire the act of vacation is an abuse of power and especially would it be a gross abuse of power if it is authorized without reference to the rights of the public and merely that the convenience of a private individual might be subserved. As the reason for vacating a highway must therefore ~~be~~ always be that the public interest is to be subserved, it may be that the consequences of this act, which is for the benefit of the public, will give a right under the constitution to claim damages. Upon no other theory can such a right be maintained; but upon this question we now express no decided or authoritative opinion.

5. It is also contended that the act of 1903 was unconstitutional, for the reason that it did not make any provision for compensation to those whose property might be damaged as a result of the act being carried into effect. In *Parham v. Justices*, 9 Ga. 341, it was held that private property could not be taken for public purposes without just compensation, and could not be so taken without an act of the legislature authorizing it, and that the act itself must make provision for compensation. At the date of this decision, there was no general law providing a method of ascertaining the damages resulting from the taking of private property for a public use. In 1894 the general assembly passed an act providing a method in which damages should be assessed in all cases where private property was taken or damaged for public purposes, and therein declared that all corporations or persons authorized to take or damage private property for public purposes should proceed as provided in the act: Civ. Code, sec. 4657 et seq. The two things required in the decision referred to are still required—that is, authority to take or damage private property, and provision for ascertaining the compensation to be paid; but since 1894 it is no longer necessary that each act conferring the authority shall itself provide the manner of ascertaining the compensation. When the authority is conferred, the general law of the state above referred to makes provision for compensation. Hence it follows that the act of 1903 is not unconstitutional, because it does not provide for the payment of compensation.

6. But it is claimed that, even if the legislative act and the proceedings of the mayor and council thereunder are all valid,

the Marietta Chair Company is bound by the judgment rendered prior to the passage of that act, and cannot now question the same; and that the decree having been rendered upon a consent verdict, it was in effect a contract between the parties that the status of the property as fixed by the decree should never thereafter be changed and that it was beyond the power of the general assembly to interfere with the vested rights of Henderson under the ⁴⁰⁹ decree. The fact that the decree was rendered upon a consent verdict does not give it any greater validity than if it had been rendered after a sharp and protracted litigation. Parties are of course bound by judgments rendered by courts of competent jurisdiction to which they have submitted their controversies, and the judgments bind them whether they expressly agree to them or not, and an express agreement that a particular judgment should be rendered gives to that judgment no peculiar character and renders it no more sacred than the ordinary judgment. While a judgment is a contract of record, the agreement which the law implies from such a contract is simply that the parties will stand to and abide what has been decreed in the case upon the law and the facts then involved or which could have been properly involved. But a judgment does not bind the parties as to any matter which was not directly or indirectly involved in the suit, and which, from the nature of the case, could not have been passed upon or adjudicated by the court at the time the judgment was rendered. At the time this judgment was rendered the municipal authorities of Marietta had no power to vacate Hansell street or any part thereof. The judgment that the obstruction be removed therefrom was therefore the only legal and proper judgment that could have been rendered in the case. The power to vacate has been conferred since the judgment, and the act of vacation has been completed. While the placing of obstructions in the street was originally wrongful, the new state of facts which has arisen since the judgment has rendered their maintenance in the street lawful and proper; and we see no reason why the party placing these obstructions may not now stand upon the rights acquired under the legislative act and the resolution of the mayor and council, notwithstanding the prior judgment. A new right has been acquired, which was not and could not have been involved in the controversy resulting in the judgment: See *Pyron v. State*, 8 Ga. 230; *Wray v. Harrison*, 116 Ga. 100, 42 S. E. 351; *Ingram v. Camden etc. Water Co.*, 82 Me. 335, 19 Atl. 861.

7. It was suggested in the argument that even if the Marietta Chair Company was entitled to the relief sought, it should have

filed an original proceeding in the nature of a bill to reform the decree, or at least should have waited until there was some proceeding instituted to enforce the decree, and then set up the matters ⁴¹⁰ now relied on, in answer to an attachment for contempt. None of the demurrers raised any question as to the procedure followed. The special demurrer simply alleged that certain paragraphs of the petition were defective because they did not set forth documents referred to therein, and the general demurrer set up merely that the plaintiff was not entitled to the relief sought, for the various reasons set forth in the demurrer. It is said that as the order of the judge refusing to grant the relief prayed for was general in its nature, it not appearing therefrom upon what ground the court based its judgment, if any ground taken in either demurrer was a sufficient reason for refusing the relief, the judgment should be affirmed. This is unquestionably the correct rule; but we find no sufficient reason set forth in either of the demurrers for refusing that prayer of the petition, which asked that an order be entered declaring that on account of the new condition of affairs the decree, though proper at the time it was rendered, should no longer be enforced; and we will not now pass upon the question whether the proper procedure was followed. Speaking for myself, I think the procedure followed was not only proper but that the practice is to be commended. The company was apparently in contempt; the decree required the removal of the obstructions; the company continued to maintain them. Instead of waiting for an attachment for contempt to be issued, it comes forward in a respectful application and shows to the court a state of facts which would relieve it from the apparent contempt. The decree was no longer operative upon it, and it was entitled to have entered upon the records of the court an order to this effect. Why should it "stand in jeopardy every hour"? A court of equity is always open for the purpose of proceeding upon mere motion to the enforcement of its orders by attachments for contempt, and I see no reason why it should not be open for one who is apparently in contempt and who comes before it to show his willingness to abide its orders but that at the same time, under the existing condition of affairs, his conduct, which at one time might have been a contempt of the court, was no longer such.

Judgment reversed.

All the justices concur.

The Municipal Authorities of a city have no inherent power to vacate a street therein or any part thereof: *Texarkana v. Leach*, 68 Ark. 40, 74 Am. St. Rep. 68. The legislature, however, may, by virtue of its plenary power, vacate or discontinue streets or highways, or authorize municipal corporations to do so: See the note to *Heinrich v. St. Louis*, 46 Am. St. Rep. 493. And when a street is vacated, the owners of the soil are restored to their original dominion over it: See the monographic notes to *Wright v. Austin*, 101 Am. St. Rep. 117; *Heinrich v. St. Louis*, 46 Am. St. Rep. 495. Compare *Kilpatrick v. Baltimore*, 81 Md. 179, 48 Am. St. Rep. 509; *Lindsay v. Omaha*, 30 Neb. 512, 27 Am. St. Rep. 415. As to the right of property owners to damages upon the vacation of a street, see the note to *Heinrich v. St. Louis*, 46 Am. St. Rep. 496-498; *Chicago v. Bursky*, 158 Ill. 103, 49 Am. St. Rep. 142.

CENTRAL OF GEORGIA RAILWAY COMPANY v. MORRIS.

[121 Ga. 484, 49 S. E. 606.]

MASTER AND SERVANT—Assault by Servant.—A railroad company is not liable for an assault and battery committed upon an intruder on its premises by its agent or servant, who, at the time, is acting wholly outside of his general authority and beyond the scope of his employment. (p. 165.)

J. Branham and McHenry & Maddox, for the plaintiff in error.

Seaborn & Wright, for the defendant in error.

⁴⁸⁵ **EVANS, J.** The error assigned in the bill of exceptions sued out in this case is that the court below overruled a demurrer to the plaintiff's petition as amended at the trial. The allegations of fact upon which the plaintiff sought to recover were substantially as follows: On October 5, 1902, plaintiff went onto the platform of defendant's freight depot at the request and invitation of a policeman of the city of Rome, for the purpose of pointing out to the policeman a man in the company's employ whom the policeman desired to arrest for a violation of an ordinance of that city. While standing on the platform, the plaintiff was approached by one J. C. O'Dell, "an employé of defendant in the capacity of trainmaster," who said to him: "I told you not to come around here again bothering my men," or words of similar import, meaning that he had told plaintiff not to bother the employés of the defendant who were under his direction and control, and implying that plaintiff was at the time

bothering an employé who was under his control and direction. After so addressing plaintiff, O'Dell violently assaulted him and threw him off the platform into the street, a distance of four feet, in the presence of many bystanders and in a place fully exposed to view by the public, and O'Dell at the same time cursed and abused plaintiff. The said "J. C. O'Dell was an employé of defendant in capacity of trainmaster, as aforesaid, whose duty was to exercise a general supervision over all trainmen and operators, and to report all neglect of duty on the part of employés." The assault upon plaintiff was made because he had come there for the purpose of pointing out to the policeman an employé and trainman who was under the control of O'Dell, and "said O'Dell was acting in his capacity as trainmaster, as aforesaid, and not in his individual capacity." The plaintiff was greatly embarrassed and humiliated by the unlawful and violent battery committed upon him, and his feelings were thereby wounded; and he asks for two thousand dollars damages.

It is unnecessary to set forth the special grounds of the defendant's demurrer; for, in the view we take of the case, the general ⁴⁹⁶ demurrer to the plaintiff's petition should have been sustained. The plaintiff did not go upon the premises of the company at its invitation, express or implied, but upon the invitation of a policeman. There is no pretense that the plaintiff had any business to transact with the company. In this respect the case differs very materially from those of *Christian v. Columbus etc. Ry. Co.*, 79 Ga. 460, 7 S. E. 216; *Columbus etc. Ry. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411, and *Georgia R. R. etc. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565. Accordingly, the company owed to the plaintiff no affirmative duty of protection against an unprovoked assault by one of its employés, and cannot be held liable in damages for a battery committed by an agent or employé who acted outside of the scope of his authority and upon his individual responsibility: *Georgia R. R. etc. Co. v. Wood*, 94 Ga. 124, 47 Am. St. Rep. 146, 21 S. E. 288; *Lynch v. Florida etc. Ry. Co.*, 113 Ga. 1105, 39 S. E. 411, 54 L. R. A. 810. The plaintiff was a mere intruder, and the company had a right to insist upon his departure. If he persisted in remaining, the company could lawfully use such force as was reasonably necessary to eject him from its premises: *Hammond v. Hightower* 82 Ga. 290, 9 S. E. 1101. This right could be exercised by any agent to whom the company had delegated the power to exercise it, the company being responsible, of course, for any abuse of such power by its agent. But it does not

appear that O'Dell, the employé who assaulted the plaintiff, was an agent to whom the company had delegated its right to eject intruders from its premises. We are informed by the plaintiff's petition that O'Dell was assuming to act, not in his individual capacity, but in his capacity as trainmaster. His official designation does not warrant the inference that he was placed by the company in charge of its premises, and had either express or implied power to determine who were intruders, and to protect the company's interests by ejecting persons who he believed came there for the purpose of bothering the employés placed under his control and direction. Therefore, that he assumed to act in his official capacity, rather than as an individual, cannot be regarded as sufficient to render the company liable for his actions. The important thing to be considered, and that upon which the right of the plaintiff to recover depends, is whether or not O'Dell acted within the scope of the business for the transaction of which he was employed. As to this all-important matter, the plaintiff simply alleges that the trainmaster's "duty was to exercise a general supervision over all trainmen and operators,"⁴⁸⁷ and to report all neglect of duty on the part of employés." There is in the petition no hint that O'Dell was held out by the company as an agent authorized to deal in its behalf with the general public in any manner whatsoever, or to perform for it any service save that of exercising a general supervision over a particular branch of its internal affairs. The company had a right to thus limit the field of his usefulness; it was not bound to appoint him its "casual ejector." That it ever, in point of fact, clothed him with authority to take any action with respect to persons coming upon its premises, at or without its invitation, does not appear. The plaintiff's petition is lacking in one of the essential ingredients necessary to a cause of action against the defendant company for the tort complained of, and should have been dismissed on general demurrer.

Judgment reversed.

All the justices concur.

An Employer is not ordinarily answerable for assaults committed by his employé when acting beyond the scope of his authority: Rahmel v. Lehdorff, 142 Cal. 681, 100 Am. St. Rep. 154; McDermott v. American Brewing Co., 105 La. 124, 83 Am. St. Rep. 225. As to whether this rule applies where the purpose of the employé's act is the protection of his employer's property, see Guille v. Campbell, 200 Pa. St. 119, 86 Am. St. Rep. 705; Brown v. Boston Ice Co., 178 Mass. 108, 86 Am. St. Rep. 469; Holler v. Röss, 68 N. J. L. 324, 96 m. St. Rep. 546. It does not apply where the relation between the

employer and the injured person is that of carrier and passenger: *Citizens' St. Ry. Co. v. Clark*, 33 Ind. App. 190, post, p. 249; *Birmingham Ry. etc. Co. v. Baird*, 130 Ala. 334, 89 Am. St. Rep. 43, and cases cited in the cross-reference note thereto. Compare *Central of Georgia etc. Ry. Co. v. Motes*, 117 Ga. 923, 97 Am. St. Rep. 223; *Georgia R. R. etc. Co. v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373.

FITTS v. CITY OF ATLANTA.

[121 Ga. 567, 49 S. E. 793.]

CONSTITUTIONAL LAW—Municipal Ordinances—Freedom of Speech.—A municipal ordinance declaring it unlawful to hold public meetings in the streets without the consent of the municipal authorities is not unconstitutional, either as interfering with the liberty of speech or as making an arbitrary discrimination in favor of some persons, nor as an unreasonable and oppressive exercise of the police power, nor because the city has no legal power to enact it. (p. 176.)

TRIAL—Continuance.—If a person violates a municipal ordinance for the previously announced purpose of testing its constitutionality, it is not error to refuse to continue his case to enable his counsel to have time to investigate the question involved. (p. 176.)

TRIAL—Violation of Ordinance—Evidence.—If a person on trial for the violation by him of a municipal ordinance seeks to attack the conduct of the city authorities, on the ground that in denying him a permit they acted arbitrarily and capriciously, it is competent to show his previous conduct, and the circumstances under which such authorities exercised the authority vested in them. (p. 176.)

A. Field and A. M. Brand, for the plaintiff in error.

J. L. Mayson and W. P. Hill, for the defendant in error.

SEE FISH, P. J. J. L. Fitts was adjudged guilty, in the recorder's court of the city of Atlanta, of violating a certain municipal ordinance, and sentence was imposed on him therefor. He took the case by certiorari to the superior court, where, upon the hearing, the certiorari was overruled. Thereupon he sued out a writ of error to this court. Our learned brother Lumpkin, who presided in the superior court, rendered an opinion in the case, which comes up in the record and which is as follows:

"This case presents a contest of strength between 'Professor' Fitts and a municipal ordinance of the city of Atlanta. The two are diametrically opposed to each other, and one must yield.

There is no half-way ground. If the ordinance was a legal and valid ordinance, Professor Fitts' conduct was illegal. If the professor is right, the ordinance is illegal. The ordinance is contained in the municipal code of 1899, and reads as follows: 'Sec. 1841. The president, chairman or other officer, or committee of men, or any persons who desire or intend to call a public meeting of the citizens of Atlanta, for political purposes, shall notify the mayor, or chief of police, of such desire or intent, and of the time and place of the meeting, before said meeting is called; and upon failure to do so, upon conviction thereof shall be fined not exceeding fifty dollars and cost, or be imprisoned in the calaboose of the city not exceeding thirty days, in the discretion of the recorder's court; and upon receiving such notice it shall be the duty of the mayor or chief of police to attend such meeting with a sufficient police force to preserve peace and order; provided, it shall not be lawful to hold any such meeting in any of the public streets of the city of Atlanta without the consent of the mayor and council, or the mayor and chairman of the board of police commissioners of the city of Atlanta; and any person calling or holding any public meeting, in any of the streets of the city of Atlanta, without such consent shall, upon conviction thereof in the recorder's court of said city, be fined in a sum not exceeding one hundred dollars, or imprisonment not exceeding thirty days, in the discretion of the court.' The plaintiff in certiorari appears to have made two or three speeches on the streets of Atlanta under permit or consent from the mayor and chairman of the board of police commissioners; but his permit was withdrawn. Afterward he determined to speak on the streets either with or without a permit ⁵⁶⁹ or consent; and failing to obtain one, he proceeded in defiance of the ordinance and in spite of it. Handbills were issued and scattered, of which the following is a copy:

**"GREAT SENSATION!
TESTING A CITY ORDINANCE.
FREE STREET LECTURE
ON SOCIALISM BY**

Prof. J. L. Fitts, of South Carolina.

Monday, August 17th, 8 p. m. corner of Broad and Marietta streets. Prof. Fitts has been refused a permit. He will speak under the right guaranteed by the 1st Amendment to the United States Constitution, which was proposed by Jefferson and approved by Washington. If interrupted, the case will be carried to the United States Supreme Court. Shall we, who built the

streets, be deprived of their use for lawfully assembling to discuss our condition and needs? Come and see. Be early and get a good place. *Don't block sidewalks or streets.*

“The COMMITTEE.”

“The petition states that this was admitted in evidence over objection on the ground that there was no evidence that said Fitts had it printed or circulated and it was irrelevant but there is no assignment of error on any such grounds nor does the mayor verify this statement in his answer to the writ of certiorari. The answer states that ‘as part of its evidence the city introduced the poster which Fitts scattered over the city, as set forth in paragraph 10 of the writ of certiorari.’ Having gathered his crowd in a public street in the very heart of the business portion of the city, he proceeded to make his test of the ordinance and speak without any permit or consent. At the appointed time, among those who answered his invitation were members of the police force; and, as he had announced a desire to make a test of the law, they accommodated him by arresting him when he refused to desist from speaking on the street; and on his trial in the recorder’s court, the mayor presiding adjudged him guilty. He brings the case to this court by writ of certiorari. The assignments of error are numerous, but the leading ground of his attack upon the ordinance is in substance, that the constitutions of the United States and of the state guarantee freedom of speech, and that under this guarantee he had a constitutional right to hold meetings and make speeches in the streets of Atlanta, and the ⁵⁷⁰ ordinance which prevented his doing so without a permit or consent of the municipal officers was invalid. In several respects the answer of the mayor to the writ of certiorari does not agree with the petition, and, not being traversed, it must control. The petition is only taken as correct where verified by the answer: *Childs v. Moran*, 114 Ga. 320, 40 S. E. 271. For instance, the answer contains the following: ‘On the night of the arrest of Fitts, the permit had been withdrawn; but Fitts spoke in defiance of the authorities of the city, and went out into Marietta street, gathered a crowd around him, and began his speech. The sidewalk was not blocked, but the crowd gathered around Fitts in the street. The language used by Fitts was not obscene or vulgar, but on the night of his arrest he had no permit to speak issued either from the mayor or anyone else. He took a box and placed same out upon the roadway, and standing thereon undertook to gather a crowd around him, and undertook to make a speech.’ In

the evidence of the chief of police occurred the following: 'The sidewalk was not blocked, but people had gathered around Fitts out in the street. The people in the street, of course, obstructed the street where they stood.' Another witness states that 'The language of Fitts was not obscene, but was that calculated to arouse strife and discord and cause revolution. He represented the socialists, and seemed to be trying to convert the people to his way of thinking by a text [attacks] upon the government, legislature, capital, etc.' Further on in the answer it is stated that 'The people gathered around him out in the street, and when they undertook to arrest Fitts a number of his sympathizers became very much excited, and it was necessary to arrest them in order to disperse the assembly.'

"The primary object of streets is for public passage. They should be kept open and unobstructed for that purpose. If damage accrues to passers by reason of improperly allowing them to be used for other purposes, the city may become liable. The streets of the city are peculiarly within the police control for the purpose of preserving and protecting their use by the public as thoroughfares. A man has many constitutional and legal rights which he can not lawfully exercise in the streets of a city. Thus, every citizen has a right to lawfully acquire and hold personal property; but he has no right, constitutional or otherwise, to insist ⁵⁷¹ on storing his possessions in the street. Every man has the inalienable right to sleep and eat (if he has the edibles), but he has no constitutional right to make his bed or set his table in the street. Every man has not only the right to, but he should, bathe and cleanse himself, and change his raiment, if he has a change. This is a duty imposed by his individual constitution, if not by that of his country. But there is no constitutional right on his part to perform his ablutions or exercise the most necessary demands of his nature in the public streets. At proper times and in proper places one may make loud noises or shoot a gun, or test his lung power vocally to a considerable extent, without offending against any law; but there is no right, inherent or constitutional, to make vociferous outcries or practice gunnery in the street. If Professor Fitts' idea of constitutional law were correct, I see no reason why every citizen should not claim a right to use the public streets for the exercise of his trade, calling or profession, which may be much more essential to his welfare and that of the public, than speechmaking by the plaintiff in certiorari, however eloquent, and regardless of the soundness or unsoundness

of his argument. If the constitution, state or federal, guarantees to Professor Fitts the right to make public speeches on the streets of Atlanta, why does it not also guarantee the same right to very lecturer who may not desire to hire a hall, and to every showman who wishes to exhibit on the highway, or to every mechanic, artisan, merchant or other citizen the right to ply his lawful vocation in the public thoroughfare? The constitutional right to exercise one's lawful vocation is quite as sacred and often more important than the right to make speeches, but the exercise of either right must yield to the municipal power properly exercised over the streets for the primary objects for which they were established. If everyone who has some constitutional right has also the constitutional right to exercise it in the streets of a city, regardless of municipal regulations, these thoroughfares may soon become a gathering place of a numerous clan rivaling those adjuncts of modern exhibitions which, since the term was used during the Columbian Exposition at Chicago in 1893 have come to be distinguished by the name of 'Midway Plaisance.' The right of the public in regard to the streets is to use them for passage as public highways, provided they are used lawfully for that purpose. ⁸⁷² But even the right of passage is subject to reasonable legislative regulations for the general good. Thus, idling and loitering in the public streets has generally been prohibited, and no one has yet doubted the constitutionality of such legislation.

"In the handbill above referred to the question is asked, 'Shall we, who built the streets, be deprived of their use for lawful assembling to discuss our conditions and needs?' Who comprise the 'committee' signing this handbill or whether Professor Fitts was a part of it, or all of it, does not appear. But as it is shown that he was from another state, and, so far as disclosed, neither a citizen, taxpayer, property owner nor resident of Atlanta, it is not quite clear how this question has any relevancy, or how he was one of the 'we' who built the streets of the city, or how he derived any peculiar right to use them as a forum or lecture-hall because they have cost the municipality or the taxpayers or the abutting property owners money to pave, or repair, or keep in order for public travel. I fear that Professor Fitts has confused in his mind the constitutional right of freedom of speech with an imaginary, though nonexistent, right to hold public meetings and make speeches in the public streets regardless of municipal laws or regulations. It is true that under an ordinance prohibiting speaking on the streets

without a permit, and a charge that he violated such ordinance, the defendant could not be convicted of the offense of obstructing the streets, arising under another ordinance, although he might be guilty of both offenses; but in considering the reasonableness or propriety of the ordinance on the subject of speaking on the public streets, and the necessity for police regulation and control of that subject, the liability to cause obstructions in the streets, interfering with public passage and causing disorder, is a matter for consideration. Neither the prohibition placed on Congress by the first amendment of the constitution of the United States, whereby it was declared that 'Congress shall make no law abridging the freedom of speech,' nor the provision of the constitution of this state which declares that no law shall be passed curtailing or restraining the liberty of speech, confers any constitutional right to gather crowds and make public orations in the streets of a city, regardless of the municipal control over them. If then, the plaintiff in certiorari (the defendant in the recorder's court) had no absolute or constitutional right to use ⁵⁷³ the public streets of Atlanta as a place to gather an audience and speak, is the ordinance void on the ground that it makes an arbitrary discrimination in favor of some against others, because it requires a permit or consent to be obtained, and prohibits holding public meetings on the streets without one? Under the general powers usually conferred on cities, or what is sometimes spoken of as the 'general welfare clause' in municipal charters, the corporate authorities could pass reasonable regulations for the preservation and keeping of their streets open and unobstructed for travel and preventing disorder upon them. Not content with this general power, the city of Atlanta obtained an amendment to its charter in 1893, which contains the following language: 'The mayor and general council of said city of Atlanta is empowered to provide by ordinance for the regulation of public meetings and public speaking in the streets of said city of Atlanta, by preventing the obstruction of the streets of said city or the gathering of disorderly crowds in said streets': City Code of 1899, 48. The ordinance quoted above does not on its face make any discrimination or say that certain persons, or persons of certain classes, might speak on the streets and certain others should not do so. It says that none shall do so without a permit or consent from certain officers. By its own terms it is not discriminative. Is it invalid because it requires a permit or consent before any person shall be allowed to speak on the streets or because it provides for

the granting of such permit by the mayor and chairman of the board of police commissioners?

"Counsel for plaintiff in certiorari have cited but one case on this subject, that of *Yick Wo v. Hopkins*, 118 U. S. 356-374, 6 Sup. Ct. Rep. 1064, 1065, 30 L. ed. 220. In that case an ordinance was passed which contained the following provision: 'Sec. 1. It shall be unlawful, from and after the passage of this ordinance, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city or county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.' Other sections of the ordinance prohibited the erection or maintaining of any scaffolding on any building without obtaining written permission of the board of supervisors, and provided punishment for a violation of the ordinance. Yick Wo and others were imprisoned for ⁵⁷⁴ violating this ordinance. The case arose on the application for a writ of habeas corpus. On the return of the writ and the hearing then had, the evidence plainly showed that the great majority of the laundries in the city were operated by Chinamen in wooden buildings; that the board of supervisors arbitrarily refused to consent for them to continue to do business in these wooden buildings, although a similar right was granted to Caucasians. Yick Wo showed that he had a city license which had not expired; that he had been engaged in the laundry business in the same premises and building for twenty-two years previously; that he had a license from the board of fire wardens, which showed that they had inspected the premises and found all proper arrangements for carrying on the business; that the stove, washing and drying apparatus, etc., were in good condition and their use not dangerous to the surrounding property from fire; and that all proper precautions had been taken to comply with the provisions of the ordinance in respect to the fire limits and making regulations concerning the erecting and use of buildings in the city, and also that he had a certificate from the health officer, showing that the premises had been inspected by him and found to be sufficiently and properly drained, and that all proper arrangements for carrying on the business of a laundry without injury to the sanitary conditions of the neighborhood had been complied with. Under the facts disclosed, the supreme court of the United States held that the ordinance and its administration were evidently intended to discriminate against the Chinese on account

of their race, and that it was an arbitrary effort to drive them out of business in favor of their Caucasian rivals. The following extract from the opinion of Mr. Justice Matthews will serve to indicate the real basis of the decision: 'It appears that both petitioners have complied with every requisite deemed by the law or the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others, who have also petitioned, all of whom happened to be 575 Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which petitioners belonged, and which in the eye of the law is not justified.' That imprisonment under an ordinance, the object of which was to drive out of business and prevent from exercising a legitimate and useful calling a number of persons, merely because they were Chinese, in the interest of competitors of another race, was illegal, presents a very different question from that involved in the present case; nor does the ruling that although the ordinance involved may have been fair and impartial in appearance, yet if it was administered by public authority with an evil eye and an unequal hand, so as practically to make illegal discriminations between persons in similar circumstances, material to their rights, imprisonment so brought about was illegal, control the present case. Here no business or useful occupation, established or to be established, was involved. The right of a man to ply his trade or business occupying property owned or rented by him, by which he serves the public and earns an honest livelihood, is very different from the alleged right contended for in this case, to hold meetings and make public speeches in the public streets of the city.

"The municipal authorities did not prohibit Professor Fitts from speaking altogether, but prohibited him from holding public meetings and speaking in the public streets without a permit or consent, and he was convicted when he did so with the express purpose of violating the municipal ordinance and assert-

ing an alleged right which he did not have. One who gathers a crowd in a public street under the invitation expressed in a handbill, announces an intention to violate and test a police regulation, mounts a box, and insists on speaking, though requested to desist by the authorities, can hardly claim to be in the same category with those who pursue lawful and useful occupations, and who desire to use property owned or rented by them in the conduct of their legitimate business. In *Massachusetts v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142, a rule was passed by the board of police forbidding singing or playing or performing on instruments in the streets without the license of the board of police. A member ⁵⁷⁶ of the Salvation Army, playing on a musical instrument, contested the rule, and the case was carried to the supreme court. In the decision it was held that 'It is not an unconstitutional delegation of power for the legislature to authorize a city council to empower the city board of police to make rules and regulations with reference to itinerant musicians'; and that the constitutional right of freedom of worship did not prevent the adoption of reasonable rules for the use of the streets. In the case of *City of Centralia v. Smith*, 103 Mo. App. 438, 77 S. W. 488, it was held that a city ordinance prohibiting the explosion of firecrackers without the written consent of the mayor is within the police power of the city. 'A city ordinance prohibiting the explosion of firecrackers without the written consent of the mayor is not void as a delegation of legislative power to the mayor.' . . . Without discussing this fully, it may be said that, of course, if the statute itself were unconstitutional or the administration of the law were in excess of the authority or in violation of the constitution, the ruling might be otherwise: See, also, *Kansas City v. Mastin*, 9 Mun. Corp. Cas. 382, 169 Mo. 80, 68 S. W. 1037; *Kennedy v. Mayor*, 9 Mun. Corp. Cas. 871, 24 R. I. 461, 53 Atl. 317; *Brodvine v. Revere*, 10 Mun. Corp. Cas. 452, 182 Mass. 598, 66 N. E. 598, 66 N. E. 607. There was nothing on the face of this ordinance to stamp it as unconstitutional. When a case of capricious, malicious or arbitrary action arises, the courts will deal with it as the law requires; but I do not think that this is one of them. The answer of the mayor to the writ of certiorari shows that there was ample room for the legitimate exercise of discretion in refusing a permit to the plaintiff in certiorari; and the manner in which he proceeded to get up his crowd in the street, and the disorder which the answer of the

mayor shows followed when the police sought to cause him to desist, indicate that there may have been good grounds for the way in which the discretion was exercised. While he may have been guilty of no actual acts of disorder himself, yet the gathering of the crowd in the street for the express purpose of violating the municipal ordinance, the practical dare to the municipal authorities to interfere with him, and the disorder occurring when they did so, as well as the other evidence in the case, indicate that the exercise of discretion on the part of the mayor and chairman of the board in refusing the permit ⁵⁷⁷ was not so arbitrary or capricious as to warrant a finding that either the ordinance or the administration of it was unconstitutional.

"In *Montross v. State*, 72 Ga. 261, 53 Am. Rep. 840 (fifth headnote), it is said: 'Every person is presumed to intend the natural and legal consequence of his conduct; and where the agent of a newspaper, knowing of the law of this state against circulating obscene literature, violated it for the express purpose of making a test case, or of vindicating the character of his paper, and, to insure a prosecution, sought the chief of police and gave him copies of the paper, he cannot complain that he succeeded in obtaining a prosecution or that the court in its charge did him injustice as to the intent with which he committed the act, although the result of his experiment was different from that which he anticipated.' In the present case, not only were the handbills referred to scattered, but the plaintiff in certiorari gave written notice to the mayor of his intention to speak on the streets of Atlanta in spite of the fact that he had no permit or consent. I hold that no constitutional right of the plaintiff in certiorari was violated.

"There was no error in refusing the motion for a continuance, under the facts set out in the mayor's answer. Nor was there any error on the part of the mayor in holding that he was not disqualified to preside, under the statements in the answer. The ordinance was not void for any of the reasons assigned; nor was the sentence so excessive as to be illegal under the facts of the case: *Whitten v. State*, 47 Ga. 297. Nor does the answer of the mayor verify the statements of the plaintiff as to the sentence: *Childs v. Moran*, 114 Ga. 320 (2), 40 S. E. 271. The assignment of error in regard to the admission of evidence concerning the former speeches and conduct of the plaintiff in certiorari might be disregarded on the ground that it is too vague and general and lacking in specification. But if it be considered that he sought to attack the conduct of the mayor and chair-

man of the board of police commissioners on the ground that in denying him a permit they acted arbitrarily and capriciously, it was legitimate to show his previous conduct and language, and the circumstances under which the municipal authorities exercised the authority vested in them. Upon the whole case I am of opinion that the certiorari ⁵⁷⁸ should be overruled and the judgment of the mayor allowed to stand; and an order will be entered accordingly."

In our opinion, the reasoning and authorities cited in the foregoing opinion clearly establish the conclusions therein stated, and the certiorari was properly overruled.

Judgment affirmed.

All the justices concur.

The Power of a Municipal Corporation to regulate and forbid the use of its streets for parades, processions, etc., is discussed in In re Frazer, 63 Mich. 396, 6 Am. St. Rep. 310; Anderson v. Wellington, 40 Kan. 173, 10 Am. St. Rep. 175; Commonwealth v. Plaisted, 148 Mass. 375, 12 Am. St. Rep. 556; and its power to prohibit the circulation of circulars and advertising matter in the streets is discussed in People v. Armstrong, 73 Mich. 288, 16 Am. St. Rep. 578.

DE FLORIN v. STATE.

[121 Ga. 593, 49 S. E. 699.]

LOTTERIES.—"Suit Clubs" whose members pay to a tailor one dollar per week, and which hold weekly drawings for thirty weeks, the member drawing a certain number receiving a suit of clothes and then ceasing to be a member of the club, and the last member who pays for thirty weeks being entitled to a thirty dollar suit of clothes, regardless of the drawings, are lotteries. (p. 178.)

C. P. Pressly and B. Crane, for the plaintiff in error.

D. G. Fogarty, solicitor, for the state.

⁵⁸² **CANDLER, J.** The sole question presented for our decision is whether under the facts stated below, the accused was guilty of the offense of carrying on a lottery. De Florin operated what was known as a "suit club." The plan of the club was as follows: Thirty men paid a dollar each to De Florin, who was a tailor, and received cards bearing numbers from one to thirty. Once a week slips of paper bearing numbers corresponding to those on the cards of the members were placed in a

box, and some disinterested person drew therefrom one slip. The member who held the lucky number was then entitled to a suit of clothes made by De Florin, worth thirty dollars. This member then ⁵⁹⁴ dropped out of the club, and his place was supplied by some one else. If a member paid a dollar a week for thirty weeks, he was entitled to a suit whether he drew the lucky number or not.

We do not hesitate to hold that this scheme constituted a lottery. We do not deem it necessary to go into a full discussion of the law on this subject; for in the case of *Meyer v. State*, 112 Ga. 20, 81 Am. St. Rep. 17, 37 S. E. 96, 51 L. R. A. 496, Mr. Justice Cobb has given such an exhaustive review of the decisions of this and other courts in regard to lottery devices that nothing can be added thereto. We will merely quote from the opinion of Robertson, J. in *Shumate's Case*, 15 Gratt. 653, which is quoted with approval in the *Meyer* case, as covering the only point in the case at bar about which there can be the slightest doubt. "It is true that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss." So, in the present case, the fact that a member who was unlucky in the drawing of prizes might, by continuing to pay a dollar a week for thirty weeks, receive a suit of clothes regardless of the result of the drawings, does not make the transaction any the less a lottery; for the lucky members of the club won prizes varying in value from one to twenty-nine dollars. We are clear that the rulings of the trial judge on the agreed statement of facts and on the demurrer to the accusation were correct.

Judgment affirmed.

All the justices concur.

A Lottery is a scheme for the distribution of prizes by chance: *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818; *State v. Kansas Mercantile Assn.*, 45 Kan. 351, 23 Am. St. Rep. 727; *State v. Nebraska Home Co.*, 66 Neb. 349, 103 Am. St. Rep. 706. See the note, on this question, to *Yellowstone Kit v. State*, 16 Am. St. Rep. 42-48. It has been said that the three essential ingredients of a lottery are consideration, prize, and chance: *Equitable Loan etc. Co. v. Waring*, 117

Ga. 599, 97 Am. St. Rep. 177. That consideration is necessary, see *Loiseau v. State*, 114 Ala. 34, 62 Am. St. Rep. 84. As to what constitutes chance, see the note to *State v. Nebraska Home Co.*, 103 Am. St. Rep. 711-713. Trading stamp transactions are not ordinarily lotteries: *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17; but nickle in the slot machines are: *Meyer v. State*, 112 Ga. 20, 81 Am. St. Rep. 17.

ATLANTA AND WEST POINT RAILROAD COMPANY v. WEST.

[121 Ga. 641, 49 S. E. 711.]

MASTER AND SERVANT—Relation, How Created.—Unless there is some act or contract by one person which expressly or impliedly recognizes another as his servant, the relation of master and servant does not exist between them. (pp. 181, 182.)

MASTER AND SERVANT—Volunteers—Duty Toward.—One who without being employed, or at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for the master, is a mere volunteer, and not entitled to that degree of diligence on the part of the master which he is bound to exercise with reference to his servants. The master is only bound not to injure the volunteer willfully, and to use care not to injure him after notice of his peril. (p. 182.)

MASTER AND SERVANT—Infant Volunteers.—The fact that a volunteer servant is of tender years and without sufficient mental capacity to appreciate the danger to which he is exposed, while it may be an element of notice to the master of the peril of the volunteer, cannot change the relations of the parties, or supply the place of negligence on the part of the master, nor impose upon him any duty not ordinarily imposed by law in relation to volunteers. (pp. 183, 184.)

Dorsey, Brewster & Howell, H. A. Hall and W. G. Post, for the plaintiff in error.

W. C. Wright and J. B. S. Davis, for the defendant in error.

¶⁴¹ **SIMMONS, C. J.** An action for damages for personal injuries was brought by Simmie L. West, a minor, by his next friend, against the Atlanta and West Point Railroad Company. Pending this action Simmie L. West died, and his duly appointed and qualified administrator was made party in his stead. To the petition as originally filed the defendant had demurred. Subsequently, the petition was amended in several particulars. The ¶⁴² defendant renewed its grounds of demurrer, and also filed other demurrers to the petition as amended. The court overruled the demurrers, and the defendant excepted. The na-

tition after amendment set up the following facts: On the morning of June 14, 1901, a freight train of the defendant became uncoupled because of a defective or broken coupling, and was stopped at and near a certain public crossing for the purpose of repairing such coupling. While the repairs were being made, a portion of the train stood upon and obstructed the crossing. One of the tools used by the train hands in repairing the coupling was an iron crowbar weighing about fifty pounds. While the repairs were in progress, young West, who came thither on his way to perform an errand for his father, after waiting for some time for the crossing to be cleared, went to the caboose or cab of the train to inquire when the crossing would be clear. When he approached the caboose, one of the brakemen on the train came up with a lot of tools which had been used to repair the coupling, among them the above-mentioned iron crowbar, and requested West to ascend the platform of the caboose and open the door so that the tools could be laid in the caboose. West, seeing no danger to himself in complying with this request, ascended the platform and was proceeding to unbolt and open the door when the brakeman handed him the crowbar, standing it up endwise and letting one end rest on the platform, and requested West to take hold of it. West took hold of the crowbar and was supporting it with one hand, the other being upon the door-knob and West being in the act of opening the door, when, "suddenly and violently and without warning signal and without warning to" West, the train was coupled together, the section attached to the engine coming in contact with the other section, of which the caboose formed a part, "with great force, and said train was then suddenly and quickly jerked and put in motion and with a sudden jerk, by reason and on account of which sudden coupling and contact and sudden starting and jerking of said train" West was thrown back and down, the door slammed upon his right hand, and the crowbar fell upon and broke his right leg. West suffered great pain in his hand and leg. The injury to the leg resulted in necrosis, and the leg had finally to be amputated. When West was requested by the brakeman to ascend the platform and open the ⁶⁴³ door of the caboose and take hold of the crowbar, both sections of the train were perfectly still, and he had no reason to suppose or presume that they would be suddenly coupled together with great force and jar and the train put in motion with a jerk without notice to him. The brakeman was a man of long experience and apparently about fifty years of age, while West was only

fifteen years and two months of age and "without mental capacity, knowledge and experience to know or comprehend that there was any danger" in complying with the request of the brakeman, "and without sufficient knowledge, mental capacity and experience to avoid any danger" to which so doing might subject him. On account and by reason of West's tender years and inexperience he did not know, while he was on the platform, that the train might be coupled together suddenly and violently and without warning and put in motion with a sudden jerk. At the time of the injury West did not "have the mental capacity, knowledge and experience of an ordinary boy fourteen years old." West was without fault and in the exercise of due care, diligence and circumspection, and his injuries were due wholly to the carelessness and gross negligence of defendant, its officers, agents and employes. The petition charged that "defendant was negligent on account of its said employé requesting [West] to ascend the platform of said cab and open said door, and in handing said iron crowbar up to [West] with the request that [West] take hold of same; and especially was defendant, its agents, officers and employes grossly negligent in suddenly, violently and with great force and jar coupling said sections of said train and causing them to come in contact as aforesaid, and then suddenly putting said train in motion with a jerk while petitioner occupied the position hereinbefore described, and in so coupling and starting said train without signal and without any notice or warning to [West]." Damages were laid in the sum of fifteen thousand dollars. The defendant's demurrers were based upon several grounds. It demurred generally and on the ground that the petition failed to show that, on the occasion when West was injured defendant owed him any duty or that the acts and doings of the defendant were any breach of any duty owing by the defendant to West. The other grounds of demurrer it is unnecessary here to mention.

1. It is virtually conceded that West was a volunteer, and not a ⁶⁴⁴ servant of the defendant. There was no contract of employment nor any act on the part of any authorized agent of the defendant which expressly or impliedly recognized West as the servant of the company: *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922. "A person cannot be subjected, without his own consent or that of his agent, to the obligations which the law has attached to the contract of hiring": 2 Labatt on Master and Servant, sec. 630.

2. One who, without any employment whatever or at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for the master, is a mere volunteer and not entitled to that degree of diligence on the part of the master which the latter is bound to exercise with reference to his servants. There are a great many cases which state that such a volunteer stands in the place of a servant, but in each such case which we have examined this position was taken in order to defeat the claim of the volunteer. In other words, the court held that the volunteer certainly stood in no better position than that of a servant, and that, conceding he stood in the position of a servant, he could not recover. Such cases not infrequently arise where, if the volunteer had been a servant, he could not recover because injured by the negligence of a fellow-servant in the course of their common employment. A number of such cases will be found in the notes to section 631 of *Labatt on Master and Servant*, volume 2. In Georgia the rule as to the liability of the master for the negligence of fellow-servants has been abrogated in railroad cases and the claim of a volunteer cannot be defeated by treating him as though he were a servant. It is necessary to assign him to his true position. He is not a servant, and cannot charge the defendant with the obligations of a master. The defendant does not, as master, owe the volunteer any duty whatever. The obligations of master and servant do not arise between them. The defendant is only bound not to injure the volunteer willfully and to use care not to injure him after notice of his peril: See *Church v. Chicago etc. Ry. Co.*, 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861; *Everhart v. Terre Haute etc. R. R. Co.*, 78 Ind. 292, 41 Am. Rep. 567.

3. The petition clearly does not make out a case of injuries inflicted willfully or because of a want of care after notice of West's peril. There is no allegation that the defendant's agents or employes who coupled and moved the train knew anything of West's danger or of his position. Even the brakeman who requested West to get upon the platform does not appear to have had any notice that West's mental capacity was less than that usually possessed by boys of his age. The train was at a public crossing, but it does not appear that West could not get by it or that this had anything to do with his compliance with the brakeman's request to assist him. The brakeman does not appear to have had any authority to make West or anyone else the servant of the defendant. There is no allegation that the brakeman had any authority, and his request

cannot be imputed to the defendant. The brakeman had no authority to invite West to get upon the platform, and the defendant was under no duty to anticipate that he would do so or to see that no injury resulted. Leaving out of consideration the minority of West, the case is simply that of a volunteer who places himself in a position of danger and who is injured by acts of the defendant which, relatively to a volunteer, do not constitute negligence. So far as appears from the petition, the defendant was guilty of no breach of any duty which it owed West, and therefore cannot be liable. Legal liability arises only upon the breach of some legal duty.

4. We think enough has been said to show that, had West been an adult, the defendant would not have been liable. West voluntarily engaged in work undertaken in compliance with the unauthorized request of the brakeman, and the defendant owed West none of the obligations which grow out of the relation of master and servant. The defendant was bound, through its agents and employes, to use care not to injure West after notice of his peril, and was bound not to injure him willfully, but no breach of this duty appears. Defendant in error, however, contended that the demurrers were properly overruled, because of the allegations as to the minority and mental deficiency of West, relying upon the case of *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922. After examining that case and also many decisions by other courts, we think this contention unsound. Infancy or want of mental capacity on the part of the plaintiff is often very material where the defense calls in question the plaintiff's own diligence. In other words, where the defendant has been negligent and claims that the plaintiff could by the exercise of due care have avoided the injury, or that the plaintiff did not use due diligence ⁶⁴⁶ to lessen the damages, or that plaintiff's negligence contributed to the injury, then the plaintiff's infancy or mental capacity is material. Whenever the plaintiff's diligence is under investigation, his mental capacity is relevant, as will be seen in many decisions in this and other states. In investigating the diligence of the defendant, the plaintiff's infancy or evident lack of mental capacity may sometimes become relevant as an element of notice to defendant of the plaintiff's peril. But in determining the relations of the parties, the infancy of the plaintiff is not material, nor can it supply the place of negligence on the part of the defendant. West was a mere volunteer. His age and mental capacity could not change this. If young and men-

tally deficient, he was no less a volunteer, relatively to the defendant, than if old and experienced. The defendant did not as master owe him any duty. The defendant was not guilty of a breach of any duty which it did owe him. The infancy of West could not supply the place of negligence on the part of the defendant, and there can be no recovery. The case of *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922, seems to conflict with this view, though the headnote recognized that there could be no recovery unless the defendant had been negligent. The decision in that case is by but two judges, and not binding, and, in so far as it conflicts with what is here ruled, will not be followed. It has more than once been criticised by able law-writers (3 Elliott on Railroads, sec. 1305; 2 Labatt on Master and Servant, sec. 636), and is, we think, unsound. We are clear in the present case that West's lack of mental capacity did not change his relations toward the defendant or impose upon it any of the obligations which ordinarily arise from the relation of master and servant; that the petition showed no breach of duty toward West as a volunteer; that West's infancy cannot supply the place of negligence on the part of the defendant; and that the court below erred in overruling the defendant's demurrer: See, in relation to the relevancy of the volunteer's infancy, *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210, 8 Am. Rep. 251, and the numerous cases cited in the notes in the two text-books last above cited. Under the above view of the case it will not be necessary to notice all of defendant's special demurrers.

Judgment reversed.

All the justices concur.

The Liability of an Employer to an employé who volunteers upon a duty with which he is not charged, is discussed in the note to McGill v. Maine etc. Granite Co., 85 Am. St. Rep. 622-627; and the liability of an employer to one who, at the request of his employés, volunteers to assist in the work, is discussed in *Johnson v. Ashland etc. Co.*, 71 Wis. 553, 5 Am. St. Rep. 243; *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320, 20 Am. St. Rep. 362; *Bonner v. Bryant*, 79 Tex. 540, 23 Am. St. Rep. 361; *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 141, 45 Am. St. Rep. 460; *Railroad Co. v. Ward*, 98 Tenn. 123, 60 Am. St. Rep. 848.

OLIVER v. HENDERSON.

[121 Ga. 836, 49 S. E. 743.]

WILLS—*Parol Explanation of.*—If a will describes property devised as lot "seventy-eight" in a certain district, parol evidence is not admissible to show that lot "sixty-eight" in such district was intended to be devised, though the testator owned no such land as that mentioned in the will, and did own the land which it is claimed he intended to devise. Parol evidence is not admissible to show that although the testator in his will described with perfect accuracy one parcel of land, yet he meant another. (pp. 186, 187.)

C. L. De Vaughn, J. A. Hixon, M. P. Hall and W. F. George, for the plaintiff.

Whipple & McKenzie, J. W. Haygood and Crum & Jones, for the defendants.

⁸³⁷ **COBB, J.** The testator gave to his wife a life estate in all his property. He then undertook to dispose of the remainder interest therein, giving to the heirs of I. O. Oliver the fee in all of the property, one of such heirs being given, in addition to an equal share, a lot of land which is described as "lot of land (78) in the second district of Dooly county." It appears that the testator did not own lot 78. The description "lot 78" is therefore false, and, under the maxim "*Falsa demonstratio non nocet*," may be rejected, provided after so doing there is a sufficient description ⁸³⁸ left to identify the property intended to be devised. Thus, the "Zachariah Emerson Place," described in a deed as being in lot 125 of a given district may be shown by parol to be located in some other lot: *Johnson v. McKay*, 119 Ga. 196, 100 Am. St. Rep. 166, 45 S. E. 992. And so a description in a will of "the land contained in eighty-one, west side of the old run of Flat creek," may be shown by parol to refer to a lot of another number, the latter lot answering the true description "west side of the old run of Flat creek": *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451. See, also, *Tyler v. Justice*, 120 Ga. 879, 48 S. E. 328; *Doe v. Roe*, 1 Wend. 541; *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553, 28 L. R. A. 149; *Merrick v. Merrick*, 37 Ohio St. 126, 41 Am. Rep. 493; cases in note to *Chappell v. Missionary Society*, 50 Am. St. Rep. 289.

Likewise ambiguities in a will, both latent and patent, may be explained by parol: Civ. Code, sec. 3325. A latent ambiguity, says Lord Bacon, is "that which seems certain and with-

out ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter outside of the deed that breedeth the ambiguity": See 1 Jarman on Wills, Am. notes, 743. This definition was applied in *Walker v. Wells*, 25 Ga. 141, 71 Am. Dec. 164, where it was held that a grant to "Berry Stephens, an orphan," might be shown by parol evidence to have been intended to be a grant to the orphan of Berry Stephens, there being such a person in life, and there being no person answering the first description.

But while parol evidence is admissible to raise a latent ambiguity in a description and then explain it, in every case the intention of the maker of the instrument must be gathered from the instrument itself, read in the light of the parol evidence. Of course, it is not permissible to create a devise or bequest by parol; but the parol evidence must show what the testator's real intention was from the language used. Thus language which is susceptible of two meanings must have been intended to mean only one; and the question to be decided in each case is, Which of the two meanings did the testator intend should be given it? If this double meaning is apparent on the face of the instrument, then the ambiguity is a patent one. If the language is apparently not of double meaning, but is shown to be so only by the aid of collateral or extrinsic facts, the ambiguity is latent. While the general rule is that only latent ambiguities are explainable by parol evidence, under our code either a patent or a latent ambiguity⁸³⁹ may be so explained: Civ. Code, sec. 3325. But equity has no jurisdiction to reform a will: *Willis v. Jenkins*, 30 Ga. 167; *Bingel v. Volz*, 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. E. 13, 16 L. R. A. 321. Wills must be taken to mean just what the language, considered in the light of the circumstances and the situation of the testator, was intended by him to mean. Parol evidence is not admissible to show that the testator meant one thing when he said another: See *Smith v. Usher*, 108 Ga. 233, 33 S. E. 876. This rule seems to be without exception, and those decisions which appear to depart from it will generally be found to be only erroneous applications of the rule.

There are many decisions dealing with questions similar to that raised by the present record. In *Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289, a will described property as the "northeast quarter of the southwest quarter" of a section of land. It was held that parol evidence was not admissible to show that the "northeast quarter of the southeast quarter" was intended

even though it appeared that the testator owned no such land as that described and no other land than that which it was claimed he intended to devise. In the opinion it was said: "There is no mistake here upon the face of the will which is here subject to investigation. There is no latent ambiguity. The property devised is accurately described. The claim is not that there is an inaccurate description apparent upon the face of the will, but that the testator ought to have described some other property. The court is asked to admit parol evidence to show that although the testator described with perfect accuracy one parcel of land, he meant another. The bare statement of the appellant's position exposes its hostility to fundamental and salutary principles of jurisprudence." To the same effect are *Bingel v. Volz*, 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. E. 13, 16 L. R. A. 321; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674, 14 Am. Rep. 538; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Ehrman v. Hoskins*, 67 Miss. 192, 19 Am. St. Rep. 297, 6 South. 776; *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757. See, also, in this connection, *Venable v. Burton*, 118 Ga. 156, 45 S. E. 29.

There are, however, decisions which are not in all respects in accord with those just cited. Some of them will be found, upon a close inspection of their facts, to be distinguishable, while others are wholly irreconcilable with the cases just above referred to. All of them purport to be based upon the intention of the testator ⁸⁴⁰ as expressed in the will, when the language of the will is considered in the light of the parol evidence. The case of *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. Rep. 617, 29 L. ed. 860, is a leading one. There a testator devised a lot, "together with the improvements thereon erected," but erroneously stated the number of a lot which had no improvements. It was held that parol evidence might be introduced to show that the testator had another lot which had improvements on it, and that this lot would be held to be the land intended to be devised. So where a testator owned only three city lots in a certain block, and undertook to devise these three lots, but erroneously gave the number of one of them, describing them all as being in the specified block, it was held that the three lots owned by the testator in that block would pass notwithstanding the erroneous description: *Seebrook v. Fedawa*, 33 Neb. 413, 29 Am. St. Rep. 488. A similar conclusion was reached in *Eckford v. Eckford*, 91 Iowa, 54, 58 N. W. 1093, 26 L. R. A. 370. See, also, *Zirkle v. Leonard*, 61 Kan. 636, 60 Pac. 318; *Priest v. Lackey*, 140

Ind. 399, 39 N. E. 54; *Stewart v. Stewart*, 96 Iowa, 620, 65 N. W. 976.

In every one of the cases where the parol evidence was admitted there was some general description, other than the false description, sufficient to identify the property intended to pass. In every one of the cases it distinctly appeared that in the district or block or other area mentioned the testator owned no other property than that which it was claimed he intended to devise, and that he did not own property answering to the description claimed to be false.

In the present case it is distinctly alleged that the testator did not own lot 78 in the second district of Dooly county. But to have made the evidence admissible it should have been alleged also that the testator owned only one lot in the second district of Dooly county, which lot was No. 68. If this had been alleged, the court might well have said, as against the demurrer, that inasmuch as it is manifest that the testator intended to devise a lot in the second district of Dooly county, he must have intended lot 68 to pass, because that was the only lot in that district and county which he owned. But the petition not only fails to allege that lot 68 was the only lot owned by the testator in that district and county, but it avers that he owned lot 68 in the second district of Dooly county "and other lands adjoining." This ⁸⁴¹ is an ambiguous averment. The adjoining lands may or may not lie in the second district of Dooly county. Probably, under the rule requiring pleadings to be construed most strongly against the pleader, the averment should be taken to mean that the adjoining lands do lie in that district and county. But in any event it was incumbent on the plaintiff to allege distinctly that they did not. There is nothing in the will to indicate that the testator intended lot 68 in the second district of Dooly county to pass rather than some other lot in that district and county, if he owned such other lots. He may have owned 88 or 54; and if so, how can the courts say that he meant 68 rather than 88 or 54? There is no legal method by which the intention of the testator can be ascertained. The court did not err in sustaining the demurrer.

Judgment affirmed.

All the justices concur.

Parol Evidence to identify devised land is discussed in the monographic note to *Chappell v. Missionary Society*, 50 Am. St. Rep. 229-294. Parol evidence may generally be heard to identify the perty devised in a will: *Gaston's Estate*, 188 Pa. St. 374, 68 Am.

St. Rep. 874. See, too, *Pate v. Bushong*, 161 Ind. 533, 100 Am. St. Rep. 287. A will purporting to devise "my real estate, to wit, the southeast quarter of the southwest quarter of section 8," operates as a devise of the northeast quarter of the southeast quarter of that section, if that was the only land owned by the testator: *Eck v. Wilson*, 142 Ind. 24, 51 Am. St. Rep. 163. But see *McGovern v. McGovern*, 75 Minn. 314, 74 Am. St. Rep. 489.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

POLICEMEN'S BENEVOLENT ASSOCIATION v. RYCE.

[213 Ill. 9, 72 N. E. 764.]

DEATH—Presumption from Absence.—The absence of a person for seven years from his usual place of abode or resort, and of whom no account can be given, and from whom no intelligence has been received within that time, raises the presumption that he is dead, and the jury, on proof of such absence, and without countervailing proof, have a right to presume his death. (p. 192.)

DEATH.—Presumption of Death arising from an unexplained absence of seven years is not a conclusive presumption, but may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it. (p. 193.)

DEATH—Presumption of—Instructions.—If an instruction, after stating facts necessary to raise a presumption of the death of a person from seven years' unexplained absence, authorizes the jury upon such proof to presume that such person is dead, it is not erroneous as stating such presumption to be conclusive, if another instruction directs the jury to consider all the facts attending the disappearance of such person, and if it believes from the evidence that he is not dead, to so find. (p. 193.)

DEATH—Presumption of—Instructions.—An instruction which singles out the fact of the expressed intention of a missing person to return to his home, as to be considered by the jury in determining whether he is presumptively dead, is properly refused if another instruction requires the jury to take into consideration upon that question all the facts and circumstances developed by the evidence. (p. 196.)

INSURANCE, LIFE—Proof of Loss—Instructions.—The question whether proof of the death of the insured has been furnished is a question of fact for the jury, but the legal effect of such proof is a question of law for the court. Hence to instruct the jury that in order to award a recovery for the plaintiff it must believe, from evidence, that defendant had received "satisfactory evidence of death," is erroneous unless the meaning of such satisfactory is defined. (p. 197.)

EVIDENCE—Admission of—Harmless Error.—Admission in evidence of a police record-book, showing the disappearance of a certain person on a certain date, even if incompetent, is harmless, when the fact thus appearing is fully shown by other competent evidence. (p. 198.)

Cannon & Poage, for the appellant.

J. C. King, W. J. King and A. J. Hirsch, for the appellee.

¹² **MAGRUDER, J.** By stipulation between the parties, substantially all the facts necessary to establish a right of recovery in the appellee are admitted, except the fact of the death of the insured. It was agreed between the parties that, at the time of the commencement of this suit, James Ryce, the insured, was a member of the appellant association in good standing; that all dues and assessments were paid up; and that the association on February 19, 1890, issued the certificate of insurance, as described in the statement preceding this opinion, to James Ryce. The undisputed evidence in the case is that James Ryce, the insured, was the husband of the appellee. The only question, therefore, to be determined by the jury was the question whether or not the jury were authorized by the evidence to presume that the insured was dead at the time of the commencement of the present suit. This question is raised upon the record by the motion of the appellant at the close of the evidence of the plaintiff below, and again at the close of all the evidence, to instruct the jury to find a verdict in favor of the defendant below, the appellant here. ¹⁴ At the close of all the evidence the defendant submitted to the court a written instruction to the jury to find the issues for the defendant, and this instruction was refused, to which ruling exception was taken by the defendant. The facts are settled by the judgments of the lower courts and the only matters to be decided by us are questions of law, arising out of the action of the trial court in giving and refusing instructions, and in ruling upon the evidence.

The court gave one instruction for the plaintiff below, and three instructions for the defendant below. The instruction, so given for the plaintiff below, appellee here, is as follows:

"The court instructs the jury, as a matter of law, that if you find from the preponderance of the evidence in this case that James Ryce, the insured, left his residence and home and has been continually absent therefrom for a period of over seven years without any intelligence being received of his whereabouts by the members of his family, relations, neighbors and acquaint-

tances within said period or at any time thereafter, then such continuous absence, together with such lack of intelligence, raises the presumption of death of the said James Ryce, and the jury on such proof have a right to presume his death."

The three instructions so given on behalf of the defendant below, appellant here, are as follows:

"1. The jury are instructed that in determining whether the insured, James Ryce, was dead at the commencement of this suit, they must consider all the circumstances under which he left which are shown on this trial, together with the length of time he has been gone, if any, and from all these facts and circumstances, the jury must determine whether the said James Ryce was in fact dead at the time of the commencement of this suit.

"2. The court instructs the jury that in order to recover in this case the plaintiff must establish her case, as charged in her declaration by the preponderance of the evidence.

"3. The jury are instructed that, if you believe from the evidence and all the facts and circumstances shown on this trial, that the insured, James Ryce, was not dead at the time of the commencement of this suit, then your verdict must be for the defendant."

1. It is said by counsel for appellant that the instruction, given for the appellee, is erroneous upon the alleged ground that it presents to the jury the presumption of death, arising from the absence of the insured for seven years without any intelligence as to his whereabouts, as a conclusive presumption; and that, in this respect, the instruction amounted to a direction to the jury to find for the appellee, if an absence of seven years without such intelligence was shown.

The language of the instruction is substantially the same as that which has been used by this court in a number of cases. In *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068, we said: "The rule in this state is, that the absence of a person for seven years from his usual place of abode or resort, and for whom no account can be given, and from whom no intelligence has been received within that time, raises the presumption that he is dead." To the same effect is *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232.

Counsel for appellant criticise the following words at the close of the instruction, to wit, "and the jury on such proof have a right to presume his death," and say that those words

amounted to a direction to the jury to find for the plaintiff. The language thus objected to, however, was used by this court in a discussion of this subject in the case of *Whiting v. Nicoll*, 46 Ill. 230, 92 Am. Dec. 248, where it was said: "So that it has become to be regarded as a settled principle, that the absence of a party for seven years without any intelligence being received of him in that time raises the presumption that he is dead, and the jury, on proof of such absence, have a right to presume his death."

¹⁶ The instruction, upon a careful consideration of its terms in connection with the instructions given for the appellant, is not justly subject to the criticism thus made upon it. The instructions, considered as one charge, authorized the jury to take into consideration the circumstances attending the disappearance of the insured, and bearing upon the question whether he was dead or not. The presumption of death, arising from an unexplained absence of seven years, is not a conclusive presumption, but may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it. The presumption of death, under such circumstances, may be overcome by proof of facts and circumstances, raising a contradictory presumption: *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028. The jury were told that they must consider all the circumstances under which the insured left which were shown on the trial, together with the length of time he had been gone, and from all such facts and circumstances they were to determine whether he was in fact dead at the time of the commencement of the suit; and they were also told that, if they believed from the evidence and from all the facts and circumstances shown on the trial, that the insured was not dead at the time of the commencement of the suit, their verdict should be for the defendant. Under the instructions, the jury were warranted in finding the fact of death after due consideration of all the other facts in evidence, but the fact of such death was not thereby presented to the jury as a conclusion, which they were obliged to draw in the face of proof furnishing ground for other inferences. There was some testimony tending to show that the insured had been discharged from the police force, and that he was in the habit of using intoxicating liquors. It was for the jury to say whether such facts were sufficient to justify them in believing that he remained away from home because of them, and not necessarily that he should be presumed

to be dead. We are of the opinion that the instructions did not present the ¹⁷ presumption of death as a rule of law, which imposed upon the jury an imperative obligation to find the fact of such death in favor of the appellee.

The instruction is also complained of, as omitting any reference to the question whether or not inquiry or search was made for the insured. In *Hitz v. Ahlgren*, 170 Ill. 63, 48 N. E. 1069, we said: "In order to enforce the presumption of death of a person after an absence of seven years, there must be evidence of diligent inquiry at the person's last place of residence, and among his relatives, and any others who probably would have heard from him, if living. . . . Long absence, alone, no matter how long continued, is not sufficient to raise the presumption of death. There must be shown an absence of seven years or more from the established residence of the party, before the presumption of death can be raised. . . . We hold, therefore, that mere absence of a person from a place where his relatives reside, but which is not his own residence, and mere failure on the part of his relatives to receive letters from him for a period of seven years, are not of themselves sufficient to raise a presumption of death. The absence must be from his usual place of abode or resort." The evidence is abundant in this case that inquiries were made at the last place of residence of the missing James Ryce, and at his usual places of abode or resort. He had four or five sisters living in Chicago in different parts of the city. Inquiries were made of them. He had relatives living in Wisconsin. Inquiries were made there. He had relatives living in Ireland. Letters were written in reference to his absence to these relatives. The evidence tends to show that a policeman named Lyons, and a brother in law of James Ryce were told by a bar-tender in Chicago on May 17th, the second day after James Ryce left his home, that Ryce was in his saloon on the evening of May 16th. Complaint is made that the clue, alleged to have been thus furnished as to his whereabouts, was not followed up. The only ground for this complaint is the statement by the policeman, ¹⁸ Lyons, in his testimony that he did not see the bar-tender, who made this statement to him after May 17th, and did not know where he could be found at the time his testimony was given. There is nothing in the evidence, so far as we have been able to discover, to show that this bar-tender knew anything about the whereabouts of James Ryce, except that he had been in his saloon on the evening of May 16th. It cannot be said that, because

of the information given by the bar-tender there was a failure to follow up a clue; but it was for the jury to say, as to this evidence and as to all the other facts and circumstances developed by the proof, whether or not those whose business it was to inquire and search for the missing man performed their duty in that respect. The objection made by counsel for appellant to the instruction is that it was silent upon this subject of inquiry or search.

The instruction presented to the minds of the jury the question whether or not James Ryce had been continually absent for a period of over seven years without any intelligence being received of his whereabouts; and such continuous absence, together with such lack of intelligence, was said by the instruction to raise the presumption of death. In view of the evidence, the language of the instruction involved a consideration of the evidence upon the question whether or not inquiries had been made as to the whereabouts of the insured. The jury were directed to consider whether or not there was a lack of intelligence as to his whereabouts, and this lack of intelligence, in view of the evidence, may have been the result of the inquiry and search shown by the proof to have been made. If there was no intelligence of the movements of the missing Ryce, the want of it was as much the result of inquiry and search as of a failure to make such inquiry and search.

But whether the instruction is capable of this interpretation or not, the court instructed the jury, at the request of the appellant, that the plaintiff in order to recover in this case "must establish her case as charged in her declaration by the ¹⁹ preponderance of the evidence." Upon referring to the declaration, we find the following allegation: "Said James Ryce suddenly and without explanation left and disappeared from his home, 1039 North Fifty-first avenue, Chicago, has been unaccountably absent ever since, and has never returned or been heard of since said departure, although plaintiff has made diligent and continuous search for him and been wholly unable to find him or get any clue of him." When the jury were thus told that the plaintiff must establish her case as charged in the declaration, the jury, upon looking at the declaration, could not have concluded otherwise than that she must establish her case by showing that there had been diligent and continuous search for the missing Ryce. Certainly, the evidence tended to establish the fact of such diligent inquiry and search.

1. Complaint is also made in behalf of the appellant that the trial court erred in refusing three instructions asked by the appellant upon the trial below. Two of these instructions related to the subject of the intention of the insured when he left his home. These instructions told the jury that, in order to find that the insured James Ryce was dead at the commencement of this suit, they must believe from the evidence that, at the time he left his usual place of abode, he intended to return thereto, or at least to let his friends and relatives hear from him. The only positive evidence as to the intention of the insured upon this subject is the testimony of his wife, that, at the time of leaving, he told her he would return on the afternoon train. In view of this testimony, the refusal of the instruction could have done the appellant no harm, because the jury were bound to conclude that he did intend to return when he left, and, therefore, under the direction contained in the instruction, were bound to find that he was dead at the commencement of the suit, and not merely to entertain a presumption as to his death. The instruction singled out the fact of his expressed intent, and gives undue prominence to it as one of the circumstances ²⁰ to be taken into consideration by the jury in coming to a conclusion upon the question whether or not he was dead. Instructions already given had required them to take into consideration all the facts and circumstances developed by the evidence, and it was wrong to single out and give prominence to one particular fact or circumstance.

As we understand the argument of counsel for appellant, it is that, if the circumstances were such as to indicate an intention on the part of the insured not to return, then his absence might be accounted for without assuming his death; that is to say, he may have intended to go elsewhere to engage in business, or may have had some other good reason for not wishing to return to his home. From such considerations it might be argued that his absence was not attributable to his death, but was due to other causes. On the contrary, the theory is that, if he intended to return when he left, and did not return, the presumption of his death would be stronger. The instruction in question eliminated from the consideration of the jury the question whether any presumption would arise as to his death from the nature of his intention, but presented to them substantially the statement that such intent was conclusive evidence upon the subject. In this respect the instruction was erroneous, as it is well settled that it is a question for the jury to deter-

mine, from all the facts and circumstances, whether or not the fact of death at the time contended for exists.

It is also assigned as error that the court refused to give an instruction on behalf of the appellant, which told the jury that, before they could recover in this case, they must believe from the evidence adduced at the trial that the defendant had received satisfactory evidence of the death of James Ryce, the insured. By the terms of the certificate of insurance the appellant association agreed to pay the amount of the insurance money to Mrs. Ryce "within thirty days after satisfactory evidence of the death of said James Ryce." The evidence shows that on July 6, 1902, about two months ²¹ after the expiration of the seven years from the disappearance of the insured, Mrs. Ryce, or her attorney and agent, presented to the association affidavits, setting up all the facts in regard to the disappearance of Ryce, and the length of the time of his absence, and the efforts made to discover his whereabouts. It is not denied that the association refused to pay the two thousand dollars to the beneficiary in the certificate, and this suit is the result of such refusal. The question whether or not there was satisfactory evidence of the death of the assured was a question to be determined by the jury in this suit, and not by the association. The question in the case upon the trial below was, not whether the association received satisfactory evidence of death, but whether the jury trying this case believed from the evidence that such death had occurred. The instruction is misleading and uncertain in not defining what is meant by satisfactory evidence of death. While the questions of fact, whether proofs of loss or of death have been furnished, or whether the insured rendered as full proofs of loss or death as the circumstances would permit, are for the jury, yet the legal effect of such proofs is a question of law for the court: 11 Ency. of Pl. & Pr. 429, 431; *Thomas v. Burlington Ins. Co.*, 47 Mo. App. 172. In *Thomas v. Burlington Ins. Co.*, the court say: "Defendant's counsel, however, seems to have gone on the theory that the sufficiency of this paper as a proof of loss; whether or not it filled the requirements of the policy and the law, was a question for the jury, and an instruction was asked wherein this question of law was submitted to the jury. The court refused the instruction, and correctly, of course. It is the province of the court, and not the jury, to declare the legal effect to be given a written instrument." In addition to this, the declaration alleges that the plaintiff submitted satisfactory evidence

of the death of the insured to the appellant association, and, as the jury were told by the instructions that the plaintiff must establish her case as charged in her declaration, they were required to find, if ²² such finding was important, that the association had received satisfactory evidence of the death.

3. It is said that the court erred in admitting in evidence a record found in the office of the police department of the city of Chicago, kept by the desk sergeant in the ordinary course of his duty, for the reason that such duty was not imposed by law. It is not necessary to discuss the question whether the court erred or not in the admission of this police record. If it be admitted that there was error in its admission, it could not have done the appellant any harm. The only fact, sought to be established by it, was the fact that James Ryce had been missing since May 15 or 16, 1895. The fact that he had been missing since that date was so overwhelmingly established by other evidence that the additional confirmation thereof by the recital in the police record was of no importance, and added no particular weight to the testimony already given by the witnesses upon that subject.

We see no good reason for interfering with the judgments of the courts below. Accordingly, the judgment of the appellate court, affirming the judgment of the circuit court, is affirmed.

PRESUMPTION OF DEATH.

I. Seven Years' Absence.

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VIII. Survivorship.

- a. Generally, 210.
- b. Husband and Wife, 211.
- c. Parent and Child or Other Relatives, 212.

I. Seven Years' Absence.

- a. Presumption Arising from.—It is a general rule of almost universal application that for all legal purposes a presumption of his

Death arises from the continued and unexplained absence of a person from his home or place of residence without any intelligence from or concerning him for the period of seven years. In other words, the law presumes, after seven years' continued absence, that a person is dead concerning whom nothing has been heard or known during that time by those who, were he living, would naturally hear from him. If a person leaves his home, or disappears, the presumption in favor of life, in the absence of special circumstances, continues until a period of seven years has elapsed without any tidings or intelligence from him, but, after that, the rule is reversed, and the law presumes his death: *Crawford v. Elliott*, 1 *Houst.* 465; *Prettyman v. Conaway*, 9 *Houst.* 221, 32 *Atl.* 15; *Doe ex dem. Cofer v. Flanagan*, 1 *Ga.* 538; *Adams v. Jones*, 39 *Ga.* 479; *Ryan v. Tudor*, 31 *Kan.* 366, 2 *Pac.* 797; *Wentworth v. Wentworth*, 71 *Mo.* 72; *Tilly v. Tilly*, 2 *Bland. Ch.* 436; *Schaub v. Griffin*, 84 *Md.* 557, 36 *Atl.* 443; *Loring v. Steineman*, 1 *Met. (Mass.)* 204; *In re Stockbridge*, 145 *Mass.* 519, 14 *N. E.* 928; *Waite v. Coaracy*, 45 *Minn.* 159, 47 *N. W.* 537; *Lajoie v. Primm*, 3 *Mo.* (529) 368; *Hancock v. American Life Ins. Co.*, 62 *Mo.* 26; *Wheelock v. Overshiner*, 110 *Mo.* 100, 19 *S. W.* 640; *Flood v. Gowney*, 126 *Mo.* 262, 28 *S. W.* 860; *Smith v. Knowlton*, 11 *N. H.* 191; *Forsaith v. Clark*, 21 *N. H.* 409, *Wambaugh v. Schenck*, 2 *N. J. L.* 229; *Burkhardt v. Burkhardt*, 63 *N. J. Eq.* 479, 52 *Atl.* 296; *Jackson v. Claw*, 18 *Johns.* 347; *McCartee v. Camel*, 1 *Barb. Ch.* 455; *Eagle v. Emmet*, 4 *Brad. Surr.* 117; *Morrow v. McMahon*, 35 *Misc. Rep.* 348, 71 *N. Y. Supp.* 961; *Ruoff v. Greenpoint Sav. Bank*, 40 *Misc. Rep.* 549, 82 *N. Y. Supp.* 881; *University of North Carolina v. Harrison*, 90 *N. C.* 385; *Lewis v. Mobley*, 4 *Dev. & B.* 323, 34 *Am. Dec.* 379; *Rice v. Lumley*, 10 *Ohio St.* 596; *Rosenthal v. Mayhugh*, 33 *Ohio St.* 155; *Whitewide's Appeal*, 23 *Pa. St.* 114; *Appeal of Esterly*, 109 *Pa. St.* 222; *Burns v. Ford*, 1 *Bail.* 507; *Craig v. Craig*, *Bail. Eq.* 102; *Boyce v. Owens*, 1 *Hill*, 8; *Corley v. Holloway*, 22 *S. C.* 381; *Griffin v. Southern Ry. Co.*, 66 *S. C.* 77, 44 *S. E.* 562; *Primm v. Stewart*, 7 *Tex.* 178; *French v. McGinnis*, 69 *Tex.* 19, 9 *S. W.* 323; *Scott v. McNeal*, 5 *Wash.* 309, 34 *Am. St. Rep.* 863, 31 *Pac.* 873; *Boggs v. Harper*, 45 *W. Va.* 554, 31 *S. E.* 943; *Cowan v. Lindsay*, 30 *Wis.* 586; *Davie v. Briggs*, 97 *U. S.* 628, 24 *L. ed.* 1086.

After seven years have elapsed without intelligence of, or hearing from, one who has absented himself from his family or his home, the presumption of life ceases, and if no other evidence is introduced on that point, the court should proceed on the presumption of his death, without submitting the question to the jury: *Cowan v. Lindsay*, 30 *Wis.* 586. As examples of the giving effect to such presumption, it may be stated that where a husband has been absent and unheard of for more than seven years, marriage by his wife to another after that time is presumed to be valid: *Burkhardt v. Burkhardt*, 63 *N. J. Eq.* 479, 52 *Atl.* 296; *Boyce v. Owens*, 1 *Hill*, 5. But no lapse of time, when the husband is absent, but known to be alive, by being seen or heard of, in less than seven years, will of itself have the

effect of allowing the wife to validly contract another marriage, or to contract as a feme sole: *Boyce v. Owens*, 1 Hill, 5. After an unaccounted for absence of seven years, the law presumes the absentee to be dead, and in a case where he, if living, would inherit real estate, such estate will descend, not to him, but to the heirs of the person dying seised: *Appeal of Esterly*, 109 Pa. St. 222; *Burns v. Ford*, 1 Bail. 507.

It seems that, in order to establish the presumption of death from seven years' absence of a person unheard of, he must absent himself from his home originally, and proof of a change of his residence from one state to another, and that he has not been heard of in the former state for a period of seven years, does not create the presumption: *Keller v. Stuck*, 4 Redf. Surr. 294; *Latham v. Tomba*, 33 Tex. Civ. App. 270, 73 S. W. 1060. The rule as to the presumption of death of a person after seven years' absence is that such presumption of law does not attach unless it appear that such person has been absent from his domicile, or his last place of residence, without intelligence concerning him for the period of seven years: *Burnett v. Costello*, 15 S. Dak. 89, 87 N. W. 575; *Puckett v. State*, 1 Sneed (Tenn.), 355.

The mere absence of a person from a place where his relatives reside, not his own residence, and their failure to hear from him for seven years, are not sufficient to raise a presumption of his death, but in order to raise such presumption, there must be evidence of diligent inquiry at his last place of residence and among his relatives, and any other persons who would probably have heard from him if he were living: *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068; *Litchfield v. Keagy*, 78 Ill. App. 398. Thus, if in an action to recover land, plaintiff's claim as heirs at law of their deceased uncle, who is alleged to be dead by reason of his having been absent and unheard of for a period of seven years, but there is no showing that he was last heard of at the place where he last lived, or that he had any other home, or that he was unmarried and without children, the proof is insufficient to establish that he died intestate and without issue, or that plaintiffs are his heirs: *Ironton Fire Brick Co. v. Tucker*, 26 Ky. Law Rep. 532, 82 S. W. 241.

Failure to hear from an absent person for seven years, who is known to have had a fixed place of residence abroad, is not sufficient to raise a presumption of his death, unless due inquiry has been made at such place without getting tidings from him: *Wentworth v. Wentworth*, 71 Me. 72; *McCartee v. Camel*, 1 Barb. Ch. 458.

The presumption of death is raised by the absence of a person from his last place of domicile unheard of for seven years, and if a person removes from his domicile in one state to establish a domicile in another state or country, this is merely a change of residence, and absence from this last domicile for seven years unheard of is the absence upon which the presumption of death must be built,

and if alive when last heard from at his new domicile the presumption is that life still continues: *Francis v. Francis*, 180 Pa. St. 644, 57 Am. St. Rep. 668, 37 Atl. 120; *Turner v. Sealock*, 21 Tex. Civ. App. 504, 54 S. W. 358. The mere absence of a person for seven years, even from his home, is not alone sufficient to raise the presumption of death, and there must be evidence also showing that he has not been heard from within that time: *Brown v. Jewett*, 18 N. H. 239.

If it is shown that a person was living some two or three years before the question of a presumption of his death from seven years' absence is raised, there is no presumption that he has since died: *Lowe v. Foulke*, 103 Ill. 58; *Lewis v. People*, 87 Ill. App. 588; *Duke of Cumberland v. Graves*, 9 Barb. 596; *Stroebe v. Fehl*, 23 Wis. (337) 324. In other words, if one is shown to be alive at a certain time, there is a presumption of the continuance of his life after that period which must be overcome by some sort of proof: *Hancock v. American Life Ins. Co.*, 62 Mo. 26.

b. *Rebuttal and Burden of Proof.*—The legal presumption of death which arises from the absence of one from his home for the period of seven years, and who in the meantime is not heard of, is equivalent to prima facie evidence of the fact, and may be rebutted by counter evidence: *Youngs v. Heffner*, 36 Ohio St. 232. If a person has not been heard from for more than seven years, he is presumed to be dead, and it devolves upon the person asserting the contrary to make it appear: *Forsaith v. Clark*, 21 N. H. 409; *Smith v. Combs*, 40 N. J. Eq. 420, 24 Atl. 9. The burden of proof is upon the person denying the death, and the presumption of death is not overcome by mere similarity of name, but the identity of the person must be shown: *Hoyt v. Newbold*, 45 N. J. L. 219, 46 Am. Rep. 757. A shorter absence than seven years will not suffice to raise a presumption of death, and the person in whose interest it is to show that he was alive within that time is at liberty to do so by such facts and circumstances as will inspire that belief in the minds of the jury. The person who claims a benefit or interest in his being alive within the seven years must prove it: *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Smith v. Smith*, 5 N. J. Eq. 484. When the presumption of death has been raised, the jury must determine, under proper instructions, what quantity of evidence will outweigh such presumption: *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Iowa, 170, 96 Am. Dec. 136.

c. *Evidence to Rebut Presumption.*—To rebut the presumption of death arising from an absence of seven years unheard from, evidence is admissible to show that the absent person has been heard of as living within that time, though by others than members of his family: *Flynn v. Coffee*, 12 Allen, 133. To rebut such presumption, testimony of a witness who saw a person bearing the supposed deceased's name as to his appearance and conversations had with him in regard to

this family connections, is admissible: *Nehring v. McMurray* (Tex. Civ. App.), 45 S. W. 1032. The testimony of several uncontradicted, unimpeached and disinterested witnesses that the absent person returned and was seen alive within considerably less than seven years from the time of his original disappearance is sufficient to rebut the presumption of his death: *Thomas v. Thomas*, 19 Neb. 88, 27 N. W. 84. When the presumption is sought to be established by the affidavits of witnesses who have no interest in the absent person, being neither relatives, friends, nor members of the family, their testimony is overcome by the testimony of one credible witness who is well acquainted with the absent person, knows his handwriting, and has received a letter from him within the seven years: *Smith v. Smith*, 49 Ala. 156.

d. *Fugitive from Justice*.—The fact that the absent person is a fugitive from justice does not prevent the presumption from arising, but is admissible to rebut the presumption of death: *Mutual Benefit Life Ins. Co. v. Martin*, 108 Ky. 11, 55 S. W. 694; *Winter v. Supreme Lodge Knights of Pythias*, 96 Mo. App. 1, 69 S. W. 662. The presumption is rebutted when it is shown that the absent fugitive has been seen, that there are rumors as to his whereabouts, and that he absented himself when a warrant was issued for his arrest, and that a woman of bad repute left about the same time: *O'Kelly v. Felker*, 71 Ga. 775.

II. Time of Death of Absent Person.

If a person leaves his home, place of residence or abode for temporary purposes, and is not seen, heard of or known to be living for the continuous term of seven years thereafter, he is presumed to be dead, but in such case the presumption of life continues and the presumption of death does not arise until the expiration of seven years from the time of the disappearance, unless there is evidence that such person was at some particular date in contact with some specific peril, or there are other circumstances sufficient to quicken the period of time necessary to raise the presumption of death. Ordinarily the time of death is presumed to be at the expiration of the seven years: *Crawford v. Elliott*, 1 Houst. 465; *State v. Henke*, 58 Iowa, 457, 12 N. W. 477; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Newman v. Jenkins*, 10 Pick. 515; *Schank v. Griffin*, 84 Md. 557, 36 Atl. 443; *Bailey v. Bailey*, 36 Mich. 181; *Smith v. Kaowiton*, 11 N. H. 191; *Executors of Clark v. Canfield*, 15 N. J. Eq. 119; *Burkhardt v. Burkhardt*, 63 N. J. Eq. 479, 52 Atl. 296; *Matter of Davenport*, 37 Misc. Rep. 455, 75 N. Y. Supp. 934; *Eagle v. Emmet*, 4 Brad. Surr. 117; *Burr v. Sim*, 4 Whart. 150, 33 Am. Dec. 50; *Schone-man's Appeal*, 174 Pa. St. 1, 34 Atl. 283. The presumption of death from seven years' unexplained absence does not by law arise until the full period elapses, and the presumption of life will continue to the end of the seven years, unless facts are proved showing that

the absent person probably died sooner: *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028. At the end of seven years from the time that an absent person was last heard of, the presumption of life ceases and the presumption of death takes its place. The legal presumption establishes not only the fact of death, but also the time of death: *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248. In the absence of any fact except that of the absence of a person for seven years without having been heard from, the presumption is that such person died on the last day of the seven years: *Kauz v. Improved Order of Red Men*, 13 Mo. App. 341. If no sufficient facts are shown from which to draw a reasonable inference that death occurred within the lapse of seven years, the person will be accounted in all legal proceedings as having lived during that period, and rights depending upon his life or death will be administered as if he died on the last day of that period: *Eagle's Case*, 3 Abb. Pr. 218.

Although it is presumed that a person absent from his home for seven years continuously without having been heard from, died at the end of that period, it will not be presumed that he died at any other time than at the end of the seven years. And if it is claimed that he met his death within a shorter time, that must be proved as a fact: *Hamilton v. Ross*, 3 N. J. Eq. 465; *McCartee v. Camel*, 1 Barb. Ch. 456; *Evans v. Stewart*, 81 Va. 724.

The rule as to the presumption of death is that it arises from the absence of the person from his domicile without having been heard of for seven years, and the current of authority establishes the rule that the presumption is only that the person is then dead, namely, at the end of the seven years, and does not extend to the death having occurred at the end of any other particular time within that period, but leaves it as a matter of fact whether it was at an earlier or later day: *State v. Moore*, 11 Ired. 160, 53 Am. Dec. 401; *Spencer v. Roper*, 13 Ired. 333; *Davis v. Briggs*, 97 U. S. 628, 24 L. ed. 1086. Although a person who has not been heard of after leaving his home for seven years is presumed to be dead, yet the question as to when such presumed death occurred is to be determined from all the facts and circumstances in the case, there being no presumption either of life or death at any particular time during the seven years: *Whiteley v. Equitable Life Ins. Co.*, 72 Wis. 170, 39 N. W. 369. If one has been absent and unheard of for seven years, the presumption arises that he is then dead, but not that he died at any particular time theretofore. To raise the latter presumption, special facts and circumstances should be shown, reasonably conducing to that end. The evidence need not be direct or positive, but it must be of such a character as to make it more probable that he died at a particular time than that he survived: *Hancock v. American Life Ins. Co.*, 62 Mo. 26. Proof that a person while living happily with his family, and standing well in the community, left home stating that he was going in a boat on a hunting trip, that

had not been heard of two years later, that an empty boat with certain articles of personal property had been found a few days after his disappearance at the place to which he stated he was going, is not sufficient to raise a presumption of his death at the time of his disappearance, in the absence of evidence that the articles found belonged to him, or that he hired a boat and went in the direction of the place where the boat was found: *Martin v. Union Mutual Ins. Co.*, 13 Wash. 275, 43 Pac. 53.

The presumption of death arising from an unexplained absence for seven years does not necessarily imply that the absent person died at the end of that period. Circumstances may be introduced to show the probability of his death at an earlier date and raise a presumption of death prior to the end of the seven years' absence: *Garden v. Garden*, 2 Houst. 574; *Winter v. Supreme Lodge Knights of Pythias*, 96 Mo. App. 1, 69 S. W. 662; *Stousenel v. Stephens*, 2 Daly, 319. But in the latter case strict and strong proof is required to create the presumption: *Garden v. Garden*, 2 Houst. 574. The jury are entitled to find, as a matter of fact, that a person died within a much less period than seven years since he was last heard of, on circumstantial evidence which leads their minds to such a conclusion: *Smith v. Knowlton*, 11 N. H. 191; *Puckett v. State*, 1 Sneed (Tenn.), 356. The presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living, and when it is sought to prove death within that period by circumstantial evidence, there must be a showing of diligent inquiry at the last place of residence and among relatives, and any others who would probably have heard from the absent person if living, and also at any known place of fixed foreign residence: *Bailey v. Bailey*, 36 Mich. 181.

A person who, for seven years, has not been heard from by those who, had he been alive, would naturally have heard from him, is presumed to be dead, but the law does not necessarily raise any presumption as to the precise time of such death, and the jury may infer that he died before the expiration of the seven years, if it appears that within that period he encountered some special peril, or came within the range of some impending or imminent danger, which might reasonably be expected to destroy life: *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086. Thus, from nonclaim of rights or exposure to peculiar sickness, death at an earlier period than seven years may be inferred: *Robinson v. Robinson*, 51 Ill. App. 316. If a person leaves his usual place of residence with an intention of returning to it, and continues to be absent from it for seven years without being heard of, he is presumed to be dead, but the time when such presumption will arise may be greatly abridged by proof that the person has encountered such perils as might be reasonably expected to destroy life, and has been so situated that according to the ordinary course of human events he must have been heard from if

had survived. No general rule can in such cases be established, but each case must be decided by a competent tribunal upon proof of the facts and probabilities that life has been destroyed: *White v. Mann*, 26 Mo. 361.

The presumption arising from the absence of a person for seven years without having been heard from, that he died at the end of that period may be rebutted by proof of facts tending to show that his death occurred at an earlier period: *Kaus v. Improved Order of Red Men*, 13 Mo. App. 341; *Hancock v. American Life Ins. Co.*, 62 Mo. 26; *Matter of Ackerman*, 3 Redf. Surr. 521. The time of the death of a person who cannot be found is presumed to be seven years from the date upon which he was last heard from, but the person to whose interest it is to show that he died before that time may rebut this presumption by showing from facts and circumstances that his death in all probability happened before that day, or at any particular day between that time and the day he was last heard from: *Whitting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 240. The burden of proving that the death took place at any particular time within the seven years lies upon the person claiming a right to the establishment of which that fact is essential: *Schank v. Griffin*, 84 Md. 557, 36 Atl. 443; *Corley v. Holloway*, 22 S. C. 380; *Evans v. Stewart*, 81 Va. 724.

III. Less than Seven Years' Absence.

a. *General Rule Respecting.*—There is no arbitrary rule as to the length of time of the continued absence of a person unheard from or of which will raise a presumption of his death: *Czech v. Bean*, 35 Misc. Rep. 729, 72 N. Y. Supp. 402. The legal presumption of death permitted by the common law after the absence and lapse of seven years unaccounted for is also allowable before the expiration of that period, if there is evidence tending to prove that death occurred at an earlier date, or showing a greater probability of death than life at the prior date: *Carpenter v. Supreme Council Legion of Honor*, 79 Mo. App. 597; *Waite v. Coaracy*, 45 Minn. 159, 47 N. W. 537; *Eagle v. Emmet*, 4 Brad. Surr. 117; *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907. Death, like any other fact, may be established by circumstantial evidence, when direct proof is not obtainable, and when the absence of a person without tidings from him concurs with other attendant and supporting circumstances to produce the conviction that he is dead, such proof is all that can be required: *Boyd v. New England etc. Life Ins. Co.*, 34 La. Ann. 448. There is no arbitrary or positive rule in respect to the time when the presumption of death may be drawn from the continued absence of a person. It is not necessary that seven years or any specific period should elapse, to lay the foundation for such presumption, but it may be drawn on a shorter period, whenever the facts of the case warrant it: *Merritt v. Thompson*, 2 Hilt. 550.

The death of an absent person may be presumed in less than seven years, from other facts and circumstances than exposure to a probably fatal danger, such as the improbability of, and lack of, motive for abandoning his home: *Cox v. Ellsworth*, 18 Neb. 664, 53 Am. Rep. 827, 26 N. W. 460; *Northwestern Mut. Life Ins. Co. v. Stevens*, 71 Fed. 258. Thus, the death of an absent person may be presumed in less than seven years from the date that he was last heard from, not only from evidence that he was exposed to peril which probably resulted in his death, but from other facts and circumstances tending to show such result, and in this connection evidence of character, habits, affections, attachments, prosperity, domestic relations, objects in life, and the like, making the abandonment of home and family improbable, and showing a want of all those motives supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred, without regard to the duration of such absence: *Tisdale v. Connecticut etc. Ins. Co.*, 26 Iowa, 170, 96 Am. Dec. 136. If one who is studious in habits, attentive to business, with a fixed and permanent residence and pleasant domestic relations, suddenly disappears, these facts may warrant a jury in finding his death at the time of his disappearance: *Hancock v. American Life Ins. Co.*, 62 Mo. 26.

b. *Exposure to Peril.*—If, when last heard from, a person was in contact with some specific peril, this circumstance may raise a presumption of death without regard to the duration of the absence. But other circumstances may create the same presumption, as where the circumstances of the disappearance are more consistent with the theory of death than that of a continuance of life, when considered with reference to those influences and motives which ordinarily govern men, in either of which cases the jury may infer death at any time within the seven years, such as may seem to it most probable; *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 121; *Sheldon v. Ferris*, 45 Barb. 124. Absence of a person alone does not raise a presumption of his death unless continued unheard from for seven years, but absence in connection with surrounding circumstances, such as the failure of his family to hear from him, his character, and business and family relations, together with the fact that he was last known to be seen near the place where a murder was supposed to have been committed, and the reputation in his family and with his friends that he is dead, creates a strong presumption of his death at the time of his disappearance, the law being satisfied with less than certainty, yet demanding a preponderance of the evidence. On the other hand, evidence to overcome the presumption of death, that the person supposed to be dead was in a financial condition which might have induced him to abscond, or that he was a speculator, or visionary in his business, is all proper evidence to be considered by the jury in determining the fact of death or life: *Sensenderfer v. Pacific Mutual Co.*, 19 Fed. 68. The perils to which one may be exposed

and which will raise a presumption of death from his absence unheard from for less than seven years most frequently arise, perhaps, from the perils of the sea. Thus, if, shortly after a vessel sails, a violent storm arose, the death of the captain of such vessel may be presumed to have occurred during such storm, after the lapse of three years without any tidings from such vessel, or any of the persons then aboard: *Gibbes v. Vincent*, 11 Rich. 323. And one on board a vessel under such circumstances is presumed to have lost his life at the time of the storm in which the vessel is presumed to have gone down or been destroyed: *Larned v. Corley*, 43 Miss. 688. If a commander of a vessel and his crew and passengers begin a voyage at sea and neither the vessel nor those who went in her are afterward heard of, the presumption arises, after the utmost limit of time for her to have completed the voyage and to have heard from all the commercial ports of the world if she had arrived, that the vessel has been lost and that all on board of her have perished. The presumption of death in such case does not rest upon the fact alone that the person in question has been absent and unheard from for a specific length of time, but also upon the fact that the vessel has not been heard from, and the question in such case is not whether it is not possible that the person may be alive, but whether the circumstances do not present so strong a probability of his death that a court should act thereon. Presumptions founded on a reasonable probability must prevail as against mere possibilities, otherwise the conclusion could never be arrived at, that a man was dead until the natural limit of human life had been reached: *Meritt v. Thompson*, 1 Hilt. 550; and to the same effect, *Gerry v. Post*, 13 How. Pr. 118; *King v. Paddock*, 18 Johns. 141; *Oppenheim v. Wolf*, 3 Sand. Ch. 571. If a person takes passage on a vessel and is shown when last seen on the voyage to be sick and despondent and leaning out through a "shutter" which opens on the water, and when the voyage is ended ineffectual search is made for him, while his belongings are found in his room, and he was not seen to go ashore at way ports and could not have landed unobserved, the facts are amply sufficient to show that he was brought in contact with a specific peril and to raise the presumption that he met his death by drowning at the time when last seen: *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 122.

IV. Long-continued Absence.

If a person has been absent from his home for a long time, the period of his absence exceeding seven years without his having been heard from or of, and nothing appears to account for such absence, the jury may, and ought to, presume his death, as a legal presumption of his death then arises: *Bailey v. Bailey*, 36 Mich. 181; *Matter of Barr*, 38 Misc. Rep. 355, 77 N. Y. Supp. 935; *Matter of Sanford*, 100 App. Div. 479; *Miller v. Beates*, 3 Serg. & R. 490, 8 Am. Dec. 658.

The absence of a person for eight years without being seen or heard

of warrants a presumption of his death, and if to this is added the proof of his frequent declarations of an intent to commit suicide, the presumption is strengthened, and warrants the conclusion that his death occurred about the time of his disappearance: *Sheldon v. Ferris*, 45 Barb. 124. If one is absent twenty years from the place where he and all of his relatives resided, and he has never been heard from, though inquiry has been made for him, he is presumed to be dead so that letters of administration on his estate are authorized: *Fercill v. Grigsby* (Tenn.), 51 S. W. 114. If a husband has been absent from his home and unheard of by his wife for seventeen years, he is presumed to be dead: *Garwood v. Hastings*, 38 Cal. 216; *Osborn v. Allen*, 26 N. J. L. 388. And if he has been absent under like circumstances for ten years, his wife may contract a valid marriage with another, as he is presumed to be dead: *Estate of Harrington*, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000. The continued absence, unheard from, and nonappearance of depositors at a bank for twenty years, and the nonclaim by them of their deposits, are circumstances sufficient to raise a presumption of their death: *Bank of Louisville v. Board of Trustees*, 83 Ky. 219. If an unmarried man has been absent and not heard from for more than twenty-five years, it may be presumed that he died seven years from his disappearance and without issue: *Chapman v. Kimball*, 83 Me. 389, 22 Atl. 254; *Shown v. McMaekin*, 9 Lea, 601, 42 Am. Rep. 680. Such an unexplained absence of forty-three years rebuts the presumption of a continuance of life and creates a presumption that the man is dead and that he left no issue him surviving: *McNulty v. Mitchell*, 41 Misc. Rep. 293, 84 N. Y. Supp. 89. In *Doe ex dem. Hurdle v. Stockley*, 6 Houst. 447, it was, however, held that if a married man and his family left the state and were not again heard of for fifty years by any of their relatives living at the place from which they absented themselves, the jury cannot be instructed to presume that they are all dead without issue. It has also been held that under such circumstances it is proper to refuse to distribute the share of an estate bequeathed to an unmarried man who has been absent over fifty years without being heard from, on the presumption that he died without issue, in the absence of satisfactory proof of diligent inquiry at the proper place to ascertain whether he is dead or alive: *Dunn v. Travis*, 56 App. Div. 317, 67 N. Y. Supp. 743; affirmed *Hornberger v. Miller*, 163 N. Y. 578, 57 N. E. 1112. The better rule is in accord with this holding, namely, that some inquiry must be made at the absentee's last known place of residence, in order to establish the presumption of his death, no matter how long his absence may have continued: *Dworsky v. Arndtstein*, 29 App. Div. 274, 51 N. Y. Supp. 597. But it has also been held that the lapse of twenty-four years, though without proof of inquiry or other circumstances, is sufficient to warrant the presumption of the death of a person of whom nothing has been heard for that length of time: *Innis v. Campbell*, 1 Rawle, 372.

The presumption of death from long-continued absence is not an imperative rule of law where the circumstances of the disappearance permit of a different inference: *Winter v. Supreme Lodge Knights of Pythias*, 96 Mo. App. 1, 69 S. W. 662. One's absence from a particular place raises no presumption of his death, no matter how long such absence is continued if there is no evidence that he ever established his residence there, but his absence from his established home or residence must be proved, and that no intelligence has been received of him for seven years or more: *Stinchfield v. Emerson*, 52 Me. 465, 33 Am. Dec. 524.

V. Sailors and Soldiers.

If a sailor departs on a voyage and is not heard from thereafter his death is presumed at the end of seven years: *Godfrey v. Schmidt*, *Cheves* Eq. 57. A seafaring man who goes to sea and is not heard from within nine years is presumed to be dead: *Burleigh v. Mullen*, 35 Me. 423, 50 Atl. 47. Or if a sailor goes to sea and is not heard from for fifteen years, the presumption arises that he is dead: *Larned v. Corley*, 43 Miss. 688. The same presumption arises if a sailor is absent unheard from for twenty-three years: *Sterrett v. Samuel*, 108 La. Ann. 346, 32 South. 428; *Holmes v. Johnson*, 42 Pa. St. 159. But it is not necessary that seven years or any specific period should elapse to lay the foundation for the presumption of the death of a sailor from his absence, and the presumption may be drawn whenever the facts of the case will warrant it. Thus, if the person "whose death is in question went to sea, and nothing has been heard from the vessel in which he left or of those who went in her, the presumption, after a sufficient length of time has ensued, will be that the vessel was lost, and that all on board perished. The length of time that must elapse to create such presumption depends upon the nature of the voyage and of the navigation, and a court or a jury will be guided by the circumstances that are laid before them, in determining whether such presumption is warrantable or not": *Merritt v. Thompson*, 1 Hilt. 550. In such cases the presumption of death may arise in a much shorter time than seven years. Thus, if it takes a vessel four months ordinarily to make the voyage, and she is not heard from in seventeen months after her departure, it may be presumed that she is lost and that all on board of her have perished: *Merritt v. Thompson*, 1 Hilt. 550.

A soldier who, after joining the army goes to war, and never returns nor is heard of afterward, may be presumed dead after twenty-five years: *Jamison v. Smith*, 35 La. Ann. 609.

VI. Extreme Old Age.

The death of a person may be presumed after a long lapse of time, as where, if alive, he would have been one hundred and fifty years old. Persons, however, have been known to live ninety and one hundred years, and the court cannot say that others have died "

an earlier age without some evidence on the subject: *Hammond v. Inloes*, 4 Md. 141.

The civil law presumes a person to be living at the age of one hundred years, and the common law does not stop much short of this: *Roe ex dem. Watson v. Tindal*, 24 Ga. 494. Thus under the civil law the death of an absentee who is less than one hundred years old is never presumed, but must be clearly shown as a fact: *Hayes v. Berwick*, 2 Mart. 138, 5 Am. Dec. 727; *Miller v. McElwee*, 12 La. Ann. 476; *Martinez v. Succession of Vives*, 32 La. Ann. 305; *Willett v. Andrews*, 51 La. Ann. 486, 25 South. 391. The death of a person before the bringing of the suit may be presumed when it would be contrary to the ordinary course of nature, through lapse of time, that he should be living at that time, although it is not necessary to indulge any presumption of the period when death occurred, or up to which time life endured: *Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 698. Thus, a grantor in a deed will be presumed to be dead eighty years after its acknowledgment by him: *Young v. Shulenberg*, 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135. The maker of a power of attorney, though aged, is presumed to have been alive five years later, at the time of the execution of a deed in his name by his attorney in fact appointed under such: *Chicago etc. R. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088.

VII. Presumption at Time Judgment Rendered.

In the case of a judgment rendered by a court of a justice of the peace more than twenty-five years in the past, in the absence of proof that the defendant was dead at the time that the suit was brought and prosecuted to judgment, the presumption is that the defendant was living at that time, and not that he was dead: *Willis v. Euddock Cypress Co.*, 108 La. 255, 32 South. 386.

VIII. Survivorship.

a. Generally.—At common law there is no presumption of survivorship in case of persons who perish by a common disaster, and in the absence of evidence from which survivorship can be determined, it will be presumed for the purpose of settling rights to property, that all persons, of whatever age or sex, perishing in a common disaster, die at the same time, as the common law does not, under any circumstances, even in the case where two or more perish by the same calamity, indulge in any presumptions of survivorship resting upon considerations of age or sex: *Balder v. Middeke*, 92 Ill. App. 227; *Middeke v. Balder*, 198 Ill. 590, 92 Am. St. Rep. 284, 64 N. E. 1002, 59 L. R. A. 653; *Russell v. Hallett*, 23 Kan. 276; *Johnson v. Merithew*, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. 132; *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; *Stinde v. Goodrich*, 3 Redf. Surr. 87; *Willbor's Petition*, 20 R. I. 126, 78 Am. St. Rep. 842, 37 Atl. 634, 51 L. R. A. 863; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385. Where two

persons perish by the same disaster, there is no presumption of law as to survivorship, in the absence of a rule prescribed by positive statutory enactment: *Robinson v. Gallier*, 2 Woods, 178, Fed. Cas. No. 11,951. In a question of survivorship arising out of a common calamity, legal presumption founded upon the circumstances of age, size or physical strength do not generally obtain in the United States. That is a doctrine of the civil law which has not been adopted, and has been given no sanction in our system of jurisprudence: *Smith v. Croom*, 7 Fla. 81; *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 518. The presumptions of law as to survivorship as between persons perishing in the same disaster which have become the rule of the civil law, have been adopted by the Civil Code of Louisiana and by the Code of Civil Procedure of California, section 1963, subdivision 40; but such presumptions apply only in the absence of circumstances of the fact, and when persons are respectively entitled to inherit from one another: *Robinson v. Gallier*, 2 Woods, 178, Fed. Cas. No. 11,951. And, generally speaking, where several lives are lost in the same disaster, there is no presumption from age or sex that either survived the other, and the fact of survivorship must be proved by the person asserting it: *Johnson v. Merithew*, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. 132; *Supreme Council of Royal Arcanum v. Kacer*, 96 Mo. App. 93, 69 S. W. 671, 169 Mo. 301, 92 Am. St. Rep. 301, 69 S. W. 370, 59 L. R. A. 653. He who claims a right by virtue of survivorship must prove the fact of the survival of him through whom he claims, and failing in this, the property or fund remains vested as it was before the calamity: *Middeke v. Balder*, 198 Ill. 590, 98 Am. St. Rep. 284, 64 N. E. 1002, 59 L. R. A. 653; *United States Casualty Co. v. Kacer*, 169 Mo. 301, 92 Am. St. Rep. 641, 69 S. W. 370, 58 L. R. A. 436. Disparity of age may be considered in determining the question of survivorship as between an adult and an infant, or a person well stricken in years: *Cuye v. Leach*, 8 Met. 371, 41 Am. Dec. 518. And if several persons grown and infant perish in a fire, the probable origin thereof and the location of the bodies when found may be considered as an aid in determining the question of survivorship: *Will of Ehle*, 73 Wis. 445, 41 N. W. 627. And the fact of such survivorship does not require any higher degree of proof than any other fact in a civil case: *Robinson v. Gallier*, 2 Woods, 178 Fed. Cas. No. 11,951.

b. *Husband and Wife*.—It is a general rule that if husband and wife are shown to have perished in the same casualty, nothing appearing to the contrary, there is no presumption of survivorship, but it is presumed that both died at the same moment: *Kansas Pacific Ry. Co. v. Miller*, 2 Colo. 445; *Balder v. Middeke*, 92 Ill. App. 227; *Middeke v. Balder*, 198 Ill. 590, 92 Am. St. Rep. 284, 64 N. E. 1002, 59 L. R. A. 653; *Fuller v. Linzee*, 185 Mass. 468. If husband and wife die together on the same night from an escape of gas in their room there is, in the absence of evidence upon the point, no presumptio

that one survived the other: *Southwell v. Gray*, 35 Misc. Rep. 740, 72 N. Y. Supp. 342. And in such case where a benefit certificate of insurance provides that it shall be paid to the heirs of the deceased member, in case the named beneficiary dies before the insured, and the wife of the member is named as beneficiary, the benefits must go to the heirs of the deceased member, and not to the heirs of his wife: *Middeke v. Balder*, 198 Ill. 590, 92 Am. St. Rep. 284, 64 N. E. 1002, 59 L. B. A. 653; *Southwell v. Gray*, 35 Misc. Rep. 740, 72 N. Y. Supp. 342. A different conclusion was reached in *Cournan v. Rogers*, 73 Md. 403, 21 Atl. 64, 10 L. B. A. 550, where it was held that there was no presumption of survivorship, but that in the absence of competent and sufficient evidence to show that the wife, the nominated beneficiary, died before her husband, her legal representatives were entitled to the fund.

If both husband and wife perish in the same calamity, no presumption of survivorship of the wife arises from the fact that an order of the probate court granting letters of administration upon her estate recites that she was the surviving wife of her husband, and in a proceeding by her administrator to set aside the probate of her husband's will, it is error to refuse evidence aliunde upon the question of survivorship: *Sanders v. Simeich*, 65 Cal. 50, 2 Pac. 741; but under subdivision 40 of section 1963 of the Civil Code of California, a presumption of survivorship arises where two persons perish in the same calamity from the probabilities resulting from strength, age and sex of the victims, and it results that if husband and wife perish in the same calamity, and there is nothing to show which expired first, and both are between the ages of fifteen and sixty, the husband is presumed to have been the survivor: *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855. It has also been held by an inferior court in New York that if husband and wife perish together at sea, and there is no evidence to authorize a different conclusion, it will be presumed that the husband survived the wife: *Moehring v. Mitchell*, 1 Barb. Ch. 264.

c. **Parent and Child, or Other Relatives.**—If a mother and her infant son perish in a common catastrophe, and there is no positive evidence as to which perished first, there is no presumption of survivorship, but it will be presumed that both perished at the same time: *Stiude v. Goodrich*, 3 Redf. Surr. 87. The same presumption prevails as to mother and child, regardless of age or the sex of the child: *Moehring v. Mitchell*, 1 Barb. Ch. 264; *Russell v. Hallett*, 23 Kan. 276; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385. In case of a mother, aged sixty-nine years, her son in law, aged forty-five, and his two children, aged respectively ten and seven years of age, who all perished in the same shipwreck, there is no presumption of survivorship: *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; and if three perish in the same calamity, no fact or circumstance appearing which it may be inferred that either survived the other, the rules of succession to their estate are to be determined as if death

occurred to all at the same moment: *Petition of Willbor*, 20 R. I. 126, 78 Am. St. Rep. 842, 37 Atl. 634, 51 L. R. A. 863. No presumption of survivorship exists as between a father, seventy years of age, and his daughter, thirty-three years of age, each of whom perished in the same disaster. In the absence of all evidence of survivorship in such case, the presumption is that the death of each occurred at the same instant: *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 518. This is the rule at common law in the absence of express statute to the contrary, but in Louisiana, where the civil law prevails, there is no presumption as to simultaneousness of death. Hence if a mother fifty-two years of age and her daughter aged thirty-five years perish in the same calamity, the latter is presumed to have been the survivor: *Succession of Langles*, 105 La. 39, 29 South. 739. A presumption of survivorship may arise from facts in evidence. Thus, if a son of affectionate disposition and in the habit of writing frequently to his parents has not been heard from for nearly seven years prior to the death of his father, and was that long ago very ill with consumption, it will be presumed that his father outlived him: *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790. If a father and his son both disappear and are unheard of for seven years, the presumption is that both are dead, but there is no presumption that the father survived the son from the mere fact that he was seen or heard of later than the son when both have not been seen or heard of for more than seven years, and in such case property in which the father has a life estate and the son a vested remainder, but which would go to the father if he survived his son, must be distributed as the property of the son: *Schank v. Griffin*, 84 Md. 557, 36 Atl. 443.

CHICAGO AND JOLIET ELECTRIC RAILWAY COMPANY v. SPENCE.

[213 Ill. 220, 72 N. E. 796.]

DAMAGES for Personal Injury—Evidence of Earning Capacity.

In allowing damages for personal injury impairing ability to work, the proper inquiry is the comparative capacity of the plaintiff to earn money at the time of, and after he had received the injury. (p. 215.)

DAMAGES for Personal Injury—Evidence of Earning Capacity.

In estimating damages for personal injury impairing ability to labor, evidence of a large salary received by the plaintiff at a remote period before he received the injury, and in a different employment, is incompetent to show his earning capacity at the time of the injury. (p. 215.)

EVIDENCE.—X-Ray Photographs or Scisographs made by an expert who testifies that he is regularly engaged in taking such photographs for physicians, that he took the negatives and developed the

sciagraphs in question, and that they are an accurate and correct representation, are admissible in evidence. (p. 217.)

TRIAL.—X-Ray Photographs or Sciagraphs admitted in evidence may be taken by the jury to the jury-room upon retirement to deliberate upon a verdict. (p. 217.)

E. Meers, for the appellant.

Eddy, Haley & Wetten and J. L. O'Donnell, for the appellee.

220 **BOGGS, J.** An electric car propelled by the appellant railway company on which the appellee was riding as a passenger collided with another of appellant's cars and appellee was **221** injured thereby. He instituted an action on the case in the circuit court of Will county, and on a hearing before the court and a jury was awarded judgment in the sum of fourteen thousand dollars. This judgment has been affirmed by the appellate court for the second district, and the record is before us on the further appeal of the company.

The collision occurred on the twenty-eighth day of March, 1902. The appellee at that time was in the employ of the Inter-Ocean Construction Company as a time-keeper and inspector of poles for electric wires, at a salary of one hundred and twenty-five dollars per month. It was insisted before the jury that because of the injury received during the collision of the cars the appellee had become permanently disabled to labor or engage in the active pursuits of life. Damages were sought for such alleged loss of capacity to earn money in the future. As being proper for the consideration of the jury in arriving at a conclusion as to the pecuniary loss which would be inflicted on appellee by reason of his injuries and disabilities, the appellee was permitted to prove, without objection, that at the time of the collision he was employed as time-keeper and inspector for the construction company and was receiving wages at the rate of one hundred and twenty-five dollars per month; that he had been so engaged since January, 1902—about three months before he was injured; that for the period of six months immediately preceding he was in the employ of the Sanitary District of Chicago at the controlling works at Lockport, at a salary of one hundred and fifty dollars per month; that immediately prior thereto he was engaged, for about one month, in putting in abutments for the Joliet Bridge Company, at a salary of one hundred and twenty-five dollars per month, and that during the period of three months immediately preceding said last employment he was engaged in putting in concrete work for water works of an electric light company, at one hundred and

twenty-five dollars per month and board, and that for the preceding term of two years he had worked for the sanitary district inspecting bridges and building abutments and piers, at one hundred dollars per month, and that for some five or six months still prior thereto ²²² he was superintendent of a quarry in Tennessee, at a salary of one hundred dollars per month. Over the objection of the appellant company the appellee was allowed to prove that he was superintendent of the Western Stone Company from 1892 and 1893, at an annual salary of two thousand five hundred dollars, and that he remained in that position until 1897, at a salary of two thousand one hundred dollars or two thousand two hundred and fifty dollars per annum. Appellee was injured in 1902. His employment as superintendent of the Western Stone Company at two thousand five hundred dollars, in 1892, was ten years before he was injured, and the salary of two thousand two hundred and fifty dollars received by him as such superintendent, when his employment in that position terminated, was for services rendered in 1897—five years before he was injured.

The proper inquiry was the comparative capacity of the appellee to earn money at the time of and after he had received the injury. He was at the time of the collision of the age of fifty-three years. The salary that he had enjoyed when superintendent of the stone company, beginning ten years before and ending more than five years before the date of the injury, ought not we think have been allowed to be proven. It was remote in point of time, and the employment was different in its nature from that in which he was engaged when injured or had been engaged in for some five years before. He was a younger man and more capable then, and had either abandoned the position of superintendent or had been supplanted by another. The salary he received from the stone company as superintendent from 1892 to 1897 was dependent on too many independent and collateral circumstances to give the jury any correct information as to the value of his earning power or capacity at the time he received the injuries which, as he claimed, deprived him of the capacity to work or earn money: *West Chicago Street R. R. Co. v. Maday*, 188 Ill. 308, 58 N. E. 933. As such superintendent he received very much larger compensation per annum than when he was injured, or at any time during the period of time immediately prior thereto, while the circumstances were such as to indicate with reasonable certainty the ²²³ extent of his ability to command wages and to earn money

The purpose of making known to the jury what salary he had received from the stone company in years past was to enhance the damages to be awarded him for the loss or diminution of his earning capacity for the future. It no doubt had that effect, and contributed to the conclusion reached by the jury that the appellee was entitled to receive the large amount specified in the verdict. The evidence was incompetent and prejudicial.

In *West Chicago Street R. R. Co. v. Maday*, 188 Ill. 308, 58 N. E. 933 we held that the appellee, who was keeping a coffee and tea store when injured and had been so engaged for five years, could not properly prove the amount of wages he had received when engaged as a worker in wood prior to the time when he engaged in selling coffees and teas, for the reason that he had abandoned the business of working in wood five years before he was injured, and for the further reason that the testimony was too remote and involved consideration of too many independent and collateral circumstances to give the jury any correct information as to his earning power at the time of the injury. We declined, however, to reverse that case, although the evidence was incompetent, for the reason the amount shown to have been earned by appellee as a wood worker was only daily wages of two dollars or two dollars and twenty-five cents per day, and that it was plain, from the competent facts proven in the case bearing on his capacity to earn money at the time that he received the injury, that the incompetent evidence had not enhanced the award of damages. In the case at bar the evidence was incompetent, and it is manifest that the damages were enhanced thereby, to what extent we cannot determine.

As the case may be again heard it is necessary we should consider the insistence that the court erred in permitting the introduction in evidence of a sciagraph, or X-ray photograph, of a portion of the chest and body of the appellee. The sciagraph was made by an expert, who testified he was ²³⁴ an X-ray expert and was regularly engaged in taking such photographs for physicians; that he took the negative from which the photograph was developed and that he developed the photograph, and that it was an accurate and correct representation, etc. It was intended to show by the sciagraph that appellee's heart had been displaced; that the walls of that organ had become thick and that an abnormally heavy tissue had formed on the walls of his heart. The testimony of the X-ray expert who had taken

the sciagraph tended to show the picture correctly represented the condition of the heart of the appellee. Photographs taken by the X-ray process are admissible in evidence after proper preliminary proof of their correctness and accuracy has been produced: 22 Am. & Eng. Ency. of Law, 2d ed., 755. We think the testimony of the X-ray expert who made the sciagraph was sufficient to justify the court in ruling that the picture should be admitted in proof. Subsequently, when the appellant was introducing testimony in chief, another X-ray expert was produced in its behalf. This witness gave testimony tending to show that the sciagraph had not been properly taken, and expressed the opinion that the picture was of little or no value as a representation of the heart and other portions of the body of the appellee. But the court was not asked to exclude the picture because of this adverse criticism, nor do we think the motion to exclude should have been granted had it been interposed.

It was not error to allow the jury to take the sciagraph with them when they retired to consider of their verdict. Paragraph 56 of the practice act (3 Starr & Curtis' Statutes of 1896, 110, p. 3054) authorizes "papers read in evidence, other than depositions, may be carried from the bar by the jury." "Papers in evidence" clearly embrace photographs or sciagraphs offered and received in evidence. One of the definitions of the word "read" given by Mr. Webster is, "to discover or understand by characters, marks, features, etc.; to gather the meaning of by inspection; to learn by ²²⁵ observation." Photographs or sciagraphs produced in evidence on a trial before a jury are, within this definition, "read" in evidence, and may be taken by the jury on their retirement to consider and determine the cause: 12 Ency. of Pl. & Pr. 591, 592; Barker v. Perry, 67 Iowa, 146, 25 N. W. 100.

For the reason stated the judgment must be and is reversed, and the cause will be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain.

That X-Ray Pictures are admissible in evidence in action for personal injuries, to show the internal condition of an injured member, see *City of Geneva v. Burnett*, 65 Neb. 464, 101 Am. St. Rep. 628; *De Forge v. New York etc. R. R. Co.*, 178 Mass. 59, 86 Am. St. Rep. 464; note to *Baustian v. Young*, 75 Am. St. Rep. 474.

CHICAGO CITY RAILWAY COMPANY v. SAXBY.

[213 Ill. 274, 72 N. E. 755.]

DAMAGES for Personal Injury—Means Employed to Effect Cure.—If an injured person uses ordinary care in selecting a physician and in the employment of other means to effect a cure, the law regards an injury resulting from the mistake of the physician, or from a failure of the means employed to effect a cure, as a part of the immediate and direct damages which naturally flow from the original injury. (p. 220.)

DAMAGES for Personal Injury—Organic Disease, Developed by Injury.—Although an injured person has an organic tendency to disease, which is developed by the injury, or by the treatment employed by an ordinarily skillful physician employed to cure the injury, this does not necessarily show that the diseased condition is not a direct damage naturally flowing from the injury. (p. 222.)

DAMAGES for Personal Injury—Disease Caused by Negligence. If a personal injury negligently inflicted causes or develops a latent tendency to disease, aggravates a prior disease, or leads in immediate sequence to disease, the defendant must respond in damages for such part of the diseased condition as his negligence has caused, and if there can be no apportionment, or if it cannot be said that the disease would have existed apart from the injury, then defendant is responsible for the diseased condition. (p. 223.)

W. J. Hynes, W. J. Ferry and M. B. Starring, for the appellant.

B. B. Davis and Walker & Williams, for the appellee.

275 HAND, J. At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant requested the court to instruct the jury to return a verdict in its favor; which the court declined to do, and the action of the court in that regard has been assigned as error.

On the evening of August 16, 1899, appellee was a passenger upon one of appellant's cars going south upon Indiana avenue, in the city of Chicago. The evidence introduced on her behalf tended to show that as the car approached Forty-fifth street she signaled the conductor to stop the car at that street; that the car stopped at the intersection of Indiana avenue and Forty-fifth street; that she started to leave the car, but before she had time to alight upon the ground, and while she stood upon the running-board upon the west side of the car, the car was suddenly started without warning to her and she was violently thrown from the car upon the street, where she struck on her left side and was injured. At the time of the accident appellee was sixty years of age and was in good health.

From the time of the injury to the date of the trial, which occurred more than two years after the accident, she had left her room but once, and at the time of the trial was unable to sit up but a portion of the time or to walk; that the injury was to her left leg; that the neck of the femur bone of that leg was fractured, and tuberculosis had developed in the left knee, and the knee joint of that leg had become ankylosed.

The main contention of the appellant is that the diseased condition of the knee was caused by the leg being improperly ^{and} treated by the physicians employed by the appellee by placing thereon splints and plaster casts and attaching to the foot pulleys and weights, and that tuberculosis, which, it is claimed, was organic with her, by reason of such imperfect treatment was developed in the knee, and it is urged that by reason of those facts the diseased condition of the knee was not the natural and ordinary consequence of the injury received by appellee at the time she fell upon the street, and that she ought not to be permitted to recover damages from the appellant for the conditions which were shown to exist in the knee. The appellee, immediately after the injury, was carried to her apartment and was treated by Drs. Freund and Farnum, and Drs. Fenger and Andrews were called in consultation—Dr. Freund was called within a few minutes after the accident—all of whom were physicians practicing their profession in the city of Chicago. She was also cared for by a trained nurse during the first eighteen months succeeding her injury, and at the time of the trial had in her employ a young woman who had devoted her entire time to her care since the trained nurse left her employ. Drs. Halstead and Findley, also physicians in practice in the city of Chicago, were called as experts and approved the treatment applied to the appellee by her attending physicians.

It was the duty of the appellee to use reasonable care to effect a speedy and complete cure of the injury which she sustained by being thrown upon the street from appellant's car, and to that end she was required to exercise reasonable care to employ physicians of ordinary skill and experience to treat her and other means to effect a cure of her injuries. She was not, however, required to employ the highest medical skill which might be found. All the law required was that she exercise such prudence as men and women of ordinary judgment, under like circumstances, would exercise in the choice of physicians and the means to be used to effect a recovery.

She was not an insurer, bound to act at her peril, and if she exercised reasonable care in selecting her physicians ²⁷⁷ and in the employ of other means for her recovery, if her physicians made a mistake in the treatment applied by them to her or the means employed failed to effect a cure, then she may recover for the entire injury which she has sustained, as the law (if the injured person uses ordinary care in selecting a physician and in the employment of other means to effect a cure) regards an injury resulting from the mistake of a physician or from a failure of the means employed to effect a cure as a part of the immediate and direct damages which naturally flow from the injury.

In *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601, which was a personal injury case, the court permitted the plaintiff to prove that the bones of his arm which were broken had not healed but that the same had formed a false joint. On page 25 (109 Ill., 50 Am. Rep. 603), the court said: "If appellee exercised ordinary care to keep the parts together and used ordinary care in the selection of surgeons and doctors and nurses, if needed, and employed those of ordinary skill and care in their profession, and still, by some unskillful or negligent act of such nurses or doctors or surgeons, the parts became separated and the false joint was the result, appellant, if responsible for the breaking of the arm, ought to answer for the injury in the false joint. The appellee, when injured, was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such surgeons and nurses as ordinary prudence in his situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession. But the law does not make him an insurer, in such case, that such surgeons or doctors or nurses will be guilty of no negligence, error in judgment or want of care. The liability to mistakes in curing is incident to a broken arm, and where such mistakes occur (the injured party using ordinary care), the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm."

²⁷⁸ In *Collins v. City of Council Bluffs*, 32 Iowa, 324, 329, 7 Am. Rep. 200, the court instructed the jury, if in the selection of a physician and in the use of other means for effecting a cure the plaintiff used reasonable and ordinary care, her damage would not be diminished, notwithstanding her suffering

might have been alleviated and her condition improved. The court, in discussing this instruction, said: "This instruction unquestionably announces a correct rule. All that the law required of plaintiff was the exercise of her judgment and the care which men of ordinary prudence, under like circumstances, would exercise in the choice of physicians and the means to be used to effect her recovery. She was not required to employ the best surgical skill and the means best adapted to heal her injuries. These may not have been within her reach; and while she may have possessed prudence, and reason even, in the highest degree possessed by men who are unlearned in medicine and surgery, she still may have been unable to choose the best means for her recovery. But she was required to exercise only the judgment and care which men and women in her condition are ordinarily capable of exercising. This is the purpose of the instruction."

The evidence fails to establish with any degree of certainty that the appellee had in her system an organic tendency to tuberculosis—at least at the time of the injury it was not developed in any form and prior to the injury her left knee was in a healthy condition; and at least two of the physicians called by her stated, in reply to hypothetical questions submitted to them, that in their opinions the conditions found in her left knee were due to an external injury, and the appellee testified—and she was corroborated by Dr. Freund—that her left leg was swollen and painful from the time of the injury. If, however, it be conceded that she had tuberculosis in her system and that the same was developed in the knee by reason of the injury thereto or from the treatment she received in the endeavors made to effect a cure of ²⁷⁹ the fracture of the neck of the femur, we think it cannot be said that the diseased condition of the knee was not a consequence which naturally and ordinarily might follow as a result of the injury of appellee caused by the negligent act of appellant.

In *Stewart v. City of Ripon*, 38 Wis. 584, an action was brought to recover damages alleged to have been sustained by the plaintiff from a fall upon a defective sidewalk. The contention was made on behalf of the city that the diseased condition of the arm of the plaintiff was due to the fact that he had in his system an organic tendency to scrofula, and that such tendency was the proximate cause of the necrosis of the bone of his arm, and not the injury which he sustained by falling upon the sidewalk. The court held that

although the diseased condition of plaintiff's arm might not have occurred but for his organic tendency to scrofula, still, if the disease was developed by the injury and a cure was retarded or prevented by reason of the presence of scrofula in the plaintiff's system, the defendant's negligence was the proximate cause of the whole injury. And in *Baltimore City Ry. Co. v. Kemp*, 61 Md. 74, it was said: "It is the common observation of all that the effect of personal physical injuries depends much upon the peculiar conditions and tendencies of the person injured, and what may produce but slight and uninjurious consequences in one case may produce consequences of the most serious and distressing character in another; and this being so, a wrongdoer is not permitted to relieve himself from responsibility for the consequences of his act by showing that the injury would have been of less severity if it had been inflicted upon anyone else of a large majority of the human family."

Mr. Thompson, in his *Commentaries on the Law of Negligence* (volume 1, section 150, page 145), says: "The duty of care and of abstaining from injuring another applies to the sick, the weak and the infirm, as well as to the strong and healthy. When this duty is violated the measure of damages is the ²⁸⁰ injury which results, though this injury may not have followed but for the peculiar physical condition of the person injured, although it may have been thereby aggravated." In section 151 of the same work, it is said: "It may be stated, generally, that if the negligence of A produces a hurt to B which aggravates a pre-existing tendency to disease in B, the negligence, and not the disease, is deemed, in law, the proximate cause of the injury."

The author of the article on *Contributory Negligence* in the *American and English Encyclopedia of Law* (volume 7, second edition, page 388), says: "In cases where the defendant's negligence caused a disease, developed a latent tendency to disease, aggravated a prior disease or led in immediate sequence to disease, the defendant must respond in damages for such part of the diseased condition as his negligence caused; and if there can be no apportionment, or if it cannot be said that the disease would have existed apart from the injury inflicted by the defendant, then the defendant is responsible for the diseased condition."

The court instructed the jury upon behalf of the defendant: "The jury are instructed that even though the defendant were liable for the accident in question, still you are

instructed that she could not recover in this case for any damage which was not the natural and necessary result of the accident and injury then sustained, if you find from the evidence she sustained injury at the time of the accident; and if you find from the evidence that the plaintiff has now, or has had, any other disability resulting from conditions which existed in the plaintiff prior to said accident and of which the accident in question was not the proximate cause, then you are not permitted, by law, to allow her anything for such disability, and should not do so from motives of sympathy or any other motive."

The question was therefore submitted to the jury whether the injuries from which the appellee was suffering were the results of the diseased condition of her system which existed ²⁸¹ prior to her injury, or were the direct and immediate result of the appellee being thrown from the car upon the ground by the negligent act of the appellant, and they were told if her injuries were the result of disabilities with which she had been afflicted prior to the injury, she could not recover damages by reason of such disabilities. The question whether or not the injuries of the appellee were the result of the negligence of the appellant or resulted from disease or a tendency to disease was a question of fact, and as there was evidence in the record which fairly tended to show that the injuries from which the appellee was suffering were the result of her being thrown from the appellant's car, we are of the opinion the trial court did not err in declining to take the case from the jury, even though the injuries of the appellee were aggravated by the fact that she had in her system an organic tendency to tuberculosis, which was developed by the injury or the treatment applied to the injury by the physicians and which retarded or prevented a complete recovery.

Numerous exceptions were taken upon the trial to the rulings of the court upon questions pertaining to the evidence. We have examined the questions thus raised, and are of the opinion that the trial court in that regard in no instance committed reversible error. For example, the appellee, in detailing, upon her direct examination, the result of the injury occasioned to her person by the fall, said: "I was upset in every particular; every function of my body, I think, was out of order from the shock, and I suffered terribly in every way." This statement of the witness was unimportant. She had already testified fully as to the manner in which she fell from the car :

the effect of the fall, and while the statement was in a certain sense the expression of an opinion, it was in a broader sense the statement of a fact—that is, the condition her person was in as a result of the injury. In any event, in the opinion of the court the refusal to strike out the answer should not cause a reversal of the case.

282 While Dr. Davis, who had treated the appellee, was upon the stand, he was asked, "What is the fact, Doctor, as to tuberculosis being occasioned by trauma or violence?" to which he replied: "Tuberculosis may be caused to center at the point of trauma; a great many instances are known where it occurs." It is urged there was no evidence upon which to base the question, as the evidence failed to show the left knee of appellee was injured at the time of the accident. The evidence showed the appellee was thrown from the car and struck upon the ground upon her left side; that prior to her injury she was in good health, and that she sustained an injury to the hip which subsequently involved the knee. While upon the stand she testified: "I suffered excruciating pain all the time in my hip and in my back—in my hip principally, but my limb was swollen and painful." Dr. Freund also stated: "The first time I discovered any visible evidence of anything the matter with the knee was the same night of the injury." He also stated: "During the period described the knee was always very painful—from the time of the injury." While he qualified this statement upon cross-examination, we think it cannot be said that there is no evidence that the knee was injured at the time of the accident. The court did not err in permitting the question to be answered.

We do not deem it necessary to take up separately and consider all of the objections to the court's ruling upon the evidence which have been raised and discussed in the briefs. Suffice it to say that they are technical in the extreme, and in our judgment had no perceptible effect upon the verdict and were not prejudicial to the appellant.

Finding no reversible error in this record the judgment of the appellate court will be affirmed.

Where One has been Injured through the negligence of another, and uses ordinary care in endeavoring to be healed and in selecting and employing physicians, but owing to the want of care or skill of the latter the injury is aggravated, the person causing the original injury is also responsible for the latter: Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601; monographic note to Gilson v. Delaware Canal Co., 36 Am. St. Rep. 845; Selleck v. Janesville, 100 Wis.

157, 69 Am. St. Rep. 906. See, too, Vallo v. United States Express Co., 147 Pa. St. 404, 30 Am. St. Rep. 741. But it seems that an aggravated condition resulting from negligence in failing to call a physician, or failing to follow his directions when called, is not an element of damages: Zibbell v. Grand Rapids, 129 Mich. 659, 89 N. W. 563; Robertson v. Texas etc. Ry. Co. (Tex. Civ. App.), 79 S. W. 96. And an injured person cannot recover for the further damages which he could have prevented by reasonable care: Galveston etc. Ry. v. Zantsinger, 98 Tex. 365, 71 Am. St. Rep. 859. The fact that an injury is aggravated by a previously existing infirmity of the person injured will not defeat a recovery: Vosburg v. Putney, 80 Wis. 523, 27 Am. St. Rep. 47; Maguire v. Sheehan, 117 Fed. 819, 59 L. R. A. 496.

MORRISON v. AUSTIN STATE BANK.

[213 Ill. 472, 72 N. E. 1109.]

APPELLATE PRACTICE—Agreed Question.—An agreement of the parties that the right of the appellant to appeal shall be submitted to the court of review does not authorize a consideration of that question if no cross-error is assigned nor motion to dismiss the appeal is made. (p. 226.)

APPELLATE PRACTICE—Assignment of Error.—If the parties agree that no advantage shall be claimed from the absence of proof from the record on appeal, appellee cannot assign as error that appellant's right to appeal does not appear from the recitals of the decree. (p. 227.)

PARTNERSHIP—Property of.—Although partnership property has many of the characteristics of estates in common and in joint tenancy, yet the interests of the partners in the firm property is neither that of joint tenants nor cotenants, but is *sui generis*. Each partner is seized per my et per tout. (p. 227.)

PARTNERSHIP—Persons Dealing with a partnership must take notice of the partnership, the identity of its members, its character, its business, and the general course thereof. (p. 228.)

PARTNERSHIP—Fraud—Person Aiding in.—A partner who disposes of partnership goods that the benefit may come to him alone perpetrates a fraud upon the partnership, and a person dealing with him knowing that such is to be the result is a party to such fraud, and can receive no benefit from it. (p. 228.)

PARTNERSHIP—Fraud—Person Aiding in.—If a person knowingly receives partnership property from a partner for his past due individual debt, he knows that he is perpetrating a fraud upon the partnership, and cannot take anything by the transaction, which is voidable. (p. 229.)

PARTNERSHIP—Fraud—Innocent Purchaser.—If a person knowingly takes partnership paper which is negotiable from a partner in payment of a past due individual debt of the latter, and transfers it to an innocent purchaser for value, the latter acquires a good title thereto. (p. 230.)

BILLS AND NOTES—Negotiability.—Municipal Warrants drawn against a special fund are not negotiable, and afford no protection to a bona fide purchaser thereof for value. (p. 233.)

J. A. Brady, for the appellant.

Castle, Williams & Smith and B. M. Smith, for the appellee.

⁴⁷⁸ RICKS, C. J. Appellee, by its brief, questions the right of John J. Morrison, the appellant, to prosecute this appeal, and that question will first receive our consideration.

The record was made up by a stipulation of the parties, in which it was agreed that the record should consist of the decree of the superior court, the order of court granting the appeal, and the stipulation. It is also agreed "that the record, pleadings and proof in such case is hereby waived, and no exception, benefit or advantage shall be taken by either party hereto to the same." It is also agreed that the objection of appellee that appellant has not the right of appeal, and the objection of the appellant to the correctness of the decree on the facts, are submitted to the consideration of the appellate court, and in case of an appeal to this court the same questions shall be presented.

We think appellee's contention should be denied for two reasons. Appellee did not assign cross-error in the appellate court or in this court, nor did it make a motion in this court to dismiss the appeal upon the ground stated. Parties may agree upon the questions they will present to the court upon the record and they will be confined to them, but the court does not consider error upon the mere agreement of the parties. Notwithstanding the agreement, the errors relied ⁴⁷⁹ on must be assigned. The appellate court took jurisdiction of the cause and disposed of it upon its merits.

The decree is not predicated upon the ground that John J. Morrison, the appellant, had no interest in the subject matter, but that the better right to the property in question was in the appellee, so that there is nothing appearing in the facts of the decree which tends to show that Morrison was not interested. On the contrary, the facts and recitals in the decree tend to show he was interested in the subject matter.

Appellee recites and relies upon *Gogan v. Burdick*, 182 Ill. 126, 55 N. E. 126, from which it quotes: "The settled rule is, that a party in whose favor a decree granting relief is rendered must sustain it by specific facts which justify it, either recited in the decree as proved on the hearing and found by the court, or by preserving the evidence establishing such facts." It may be first noted that the rule there cited is applicable only to the person in whose favor the decree is granted; but if it be held

applicable to both of the parties, then it is further seen that the fact may appear by recitals in the decree or the proof at the hearing. In this case it is expressly stipulated that upon any matter of proof no exception, benefit or advantage shall be taken by either party. Under the authority cited, the question here presented was one that might have appeared by the proof in the record if it did not sufficiently appear from the recitals in the decree, and as appellee agreed that it is to have no advantage because of the absence from the record of the proof, it cannot now be heard to urge error upon a matter that might have rested in proof.

The questions upon the merits of this case that are presented for our consideration, as we conceive them, are as to the rights and powers of a partner in reference to the partnership property, and the character of the instruments here in question. The latter question involves the determination of whether those instruments are negotiable within the meaning of the law-merchant, so that the purchaser thereof may ⁴⁸⁰ take the same unaffected by the rights of the maker or intermediate holders.

The legal characteristics of partnership property, and the interests, powers and rights of the parties relative to the same, are peculiar, and cannot be well assimilated to any other class of property when viewed in its relation to its ownership. While it has many characteristics of estates in common and in joint tenancy, yet the interest of partners in the firm property is neither that of joint tenants nor that of tenants in common, but is *sui generis*. In *Taft v. Schwamb*, 80 Ill. 289 (page 300), it is said: "Each partner is possessed *per my et per tout*—that is, by the half or moiety and by all—or, in other words, each has a joint interest in the whole but not a separate interest in any particular part of the partnership property; and being so possessed, and because the title of partners is undivided, it follows that all have a moiety or the same species of interest in the stock in trade, whether each individual partner contributes exactly in the same proportion or not. But their several degrees of interest must be regulated according to the stipulated proportions and the different conditions of the partnership. To whatever share a partner may be entitled, in whatever sum the firm may be indebted to him, he has no exclusive right to any part of the joint effects until a balance of accounts be struck between him and his copartners and it be ascertained precisely what is the actual amount of his interest." If he sell his interest in the partnership without the consent of his partner that the pu

chaser shall become a partner and succeed him in the partnership, the purchaser does not by his purchase become a partner, but simply becomes the owner of the proportion his vendor held in the partnership after the closing up of the partnership and the payment of the partnership debts. If a partner die, his heirs do not succeed to his rights as a partner nor to the partnership property—and particularly so where it is personal property—but the surviving partners hold all the property until the closing up and settlement of ⁴⁸¹ the partnership, when the heirs succeed merely to the proportionate share of the remaining assets. These attributes of such property arise in a large degree from the existence of the situation of two or more persons having interests in the business, being clothed with power to conduct it. They owe fidelity to each other, and the firm, as such, owes good faith to the public, and it is in the adjustment of the respective rights and duties between the partners and the public that the qualities peculiar to this property are given it. Where a business is being conducted by a number of persons who are owners of that business, it is necessary that each of the persons so owning shall be invested with power to do all things in the regular, necessary and usual course of business, and when they do so it is necessary and proper that those who deal with them shall be protected. These considerations have led the courts to require of persons who deal with partnerships to take notice of the partnership, the identity of its members, the character of the partnership, its business and the general course of that business, as the public owes to the partnership the same fidelity, when dealing with its individual members, that the partnership owes to the public in such cases. Ordinarily partnerships are conducted for profit. The property of the partnership is usually sold for money and the money reinvested, and through these means the business is kept up. The return of sales received by each partner is for the partnership—the result and representative of the partnership goods—and is to be accounted for to the partnership or turned into it by the person who makes the sale. These matters are, and must be, known to all persons who deal with them. The partner who makes disposition of partnership goods that the benefit may come to him alone perpetrates a fraud upon the partnership, and the person who deals with him knowing that such is to be the result is a party to that fraud and can receive no benefit from it. When Thomas O'Brien, the father of George I. O'Brien, received from him the warrants

or vouchers in question for the payment ⁴⁸² of money that belonged to the partnership, of which appellant was one, in payment of a past due debt to himself from his son and not from the partnership, he knew that his son was making a fraudulent use of the partnership property, and being a party to that fraud he did not and could not take anything by it. As between him and the partnership it was as though the transaction had not been made at all, or as though he had found or stolen the property acquired by him through such means. True it is that the public, in dealing with a partner in the regular course of business, is not required to see that the partner accounts for the funds received by him for the partnership property. If a purchase be made in good faith or an assignment of paper belonging to the partnership shall be made by one of the partners in the firm name for a cash consideration that is a fair equivalent for the property, or under such circumstances that the purchaser is not chargeable with notice of the fraudulent purpose of the partner who is making the disposition, then the purchaser is not required to see that the partner does account to the partnership for the proceeds thus obtained by him; but when a partner disposes of the property of the partnership and obtains nothing, he can return nothing to the partnership, and one so dealing with a partner cannot shut his eyes to the transaction and say that he is innocent of any wrongful intention toward the partnership, and one who receives the partnership property from one partner for a past due debt to himself from that partner knows that the partner is not receiving anything that can be shared with the partnership and knows that he is thereby working a fraud upon the partnership. The transaction may be ratified by the partnership and may be validated, as one may elect to waive a tort and proceed in assumpsit as for goods sold, but until, with a full knowledge of all the facts, the partnership has ratified the transaction it is voidable. When Thomas O'Brien received the orders from his son he knew the partnership was to receive nothing for them, and the transaction was ⁴⁸³ fraudulent and voidable. If, however, the instruments so obtained by him are negotiable in the sense that promissory notes and bills of exchange are under the law-merchant, he might sell or dispose of them to an innocent purchaser for value, who would obtain a good title to them as against all the world.

We have looked to the act authorizing the issuance of these warrants or vouchers, and there is no provision found in it giving them the required characteristics of negotiability. We have

looked to the statute in relation to negotiable instruments, and find that by sections 3 and 4 of chapter 98, certain instruments are mentioned and are given the quality of assignability by indorsement, so that they may be passed by assignment in writing in the same manner as bills of exchange are, "so as absolutely to transfer and vest the property thereof in each and every assignee successively." By section 5 it is provided that the assignee may sue in his own name and maintain the same kind of action that the original obligee or payee could have done; and section 7, which was section 1 of an act approved June 4, 1895, in relation to promissory notes, etc. (Laws 1895, p. 262), states just what instruments among all the instruments referred to in the act shall be clothed with the attributes of negotiability according to the custom of merchants, and by it those qualities are only extended to promissory notes payable in money, and it contains the further provision that the holder or owner of any other evidence of indebtedness mentioned in the act may sue the assignor when he has shown due diligence to collect from the maker. So it will be seen that neither by the act authorizing the issuance of the vouchers in question nor by our statute in regard to negotiable instruments are the instruments in question given the qualities necessary to protect appellee as an innocent purchaser, unless such instruments can be held to be promissory notes within the meaning of our act.

It seems to have been generally held that municipal corporations have no power, in the absence of an express grant, ⁴⁸⁴ to issue unimpeachable evidence of indebtedness, and so it was held in *Police Jury v. Britton*, 15 Wall. 566, 21 L. ed. 251: "It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable obligations, which may be multiplied to an indefinite extent." And in *Mayor v. Ray*, 19 Wall. 468, 22 L. ed. 164, it is said: "Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes; but to invest such documents with the character and the incidents of commercial paper, -- as to render them in the hands of bona fide holders absolute

obligations to pay, however irregular or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied." The above cases are quoted and the subjectably discussed in the case of *State v. Cook*, 43 Neb. 318, 61 N. W. 693.

In *Miner v. Vedder*, 66 Mich. 101, 33 N. W. 48, a suit was brought against the treasurer of a village upon a warrant, by the assignee thereof. The treasurer answered, among other things, that he had received notice from one Boies that the orders originally belonged to him and that the relator was not entitled to them. The court found that the relator was not the lawful holder and was not entitled to recover. Upon appeal, in discussing that phase of the case, the court said: ~~488~~ "It was claimed upon the trial, and is argued here, that relator purchased the orders in good faith, for a valuable consideration, without notice of the mistake or lien claimed, and that therefore, being a bona fide holder of said orders, neither such mistake nor lien could be allowed or enforced as against him. It is sufficient to say, in answer to this argument, that these warrants or orders issued by the village of Hudson are not negotiable instruments, and while in the hands of the relator are subject to all the equities existing between the payee and the village, or between the payee and any other person, without reference to the good faith of the relator in his purchase."

This court, in *People v. Johnson*, 100 Ill. 537, 39 Am. Rep. 63, speaking of a county order, said: "We regard the rule well settled, by considerations of public policy as well as by a decided preponderance of authority, that warrants or orders drawn by one municipal officer upon another, in the disbursement of the funds of the municipality and payment of its indebtedness, are not to be regarded as negotiable or commercial paper, cutting off equities against the corporation. As we have already seen, the official agents of these municipalities have no implied power to execute such paper, and to clothe these warrants or orders with the qualities and attributes of commercial securities would be to give them a character foreign to the object and purposes of their creation." In that case the case of *Garvin v. Wiswell*, 83 Ill. 215, in which a bond issued by a county to meet

an appropriation to pay bounties for volunteers was held to be a negotiable instrument, is reviewed and distinguished, and attention is directed to the fact that the special act authorizing the issuance of bonds gave them the character of negotiable instruments. The court, in discussing it, said (100 Ill. 547, 39 Am. Rep. 63): "The effect of this act was equivalent to a previous authority to issue the instrument, and gave to it, as was originally intended, all the attributes of commercial paper. That the legislature has ample power to authorize counties or other ⁴⁹⁸ municipalities to issue negotiable securities is not to be questioned, yet without such special legislative authority they have no power to do so, and there is no pretense that the order in this case was issued for any such purpose or was authorized by any special act of the legislature."

The case of *First Nat. Bank v. Gates*, 66 Kan. 505, 97 Am. St. Rep. 383, 72 Pac. 207, is very similar in principle to the case at bar. There Gates gave to Blanchard a sum of money with which to purchase for him county warrants. Blanchard was cashier of the bank and Vawter was its president. Blanchard purchased the warrants and placed them in the bank for Gates. Vawter took the warrants and pledged them as security for a loan from the appellant, the First National Bank. Gates demanded the warrants and their delivery was refused and he sued for conversion. The court says: "The bank, however, claims that having taken this warrant in the usual course of business for a sufficient consideration, without knowledge of Vawter's wrong, it is entitled to be protected by the law-merchant. The question is, therefore, is a county warrant, which is negotiable in form but non-negotiable in the sense that the county issuing it may defend against it, nevertheless negotiable as between successive holders, so that a thief may vest title to it in a bona fide taker of it? That one so acquiring ordinary commercial paper would be protected is not questioned. An innocent purchaser, in good faith, of commercial paper gets a good title, even though he purchase from a thief: Citing authorities. This is so because of the law-merchant. . . . But paper non-negotiable for any reason is not thus protected. The very fact of its being non-negotiable is a sign of warning to the prospective purchaser and places him on his guard. Municipal warrants, though negotiable in form, are non-negotiable in fact, hence they are not within the protection of the rule which ————rds commercial paper." To the same effect is *Keller v. —*, 22 Cal. 457, 83 Am. Dec. 78.

⁴⁸⁷ We think the above cases state a sound rule, and one which sound public policy and the greater weight of authority alike demand shall be adhered to.

There is another insuperable reason why the warrants here in question cannot be deemed or held to be commercial paper. They were given for work done under the local improvement act of 1897 and payable out of special assessments, and so state upon their face. By sections 73 and 90 of that act the contractor or other person holding such warrants has no claim against the municipality issuing them, other than the fund arising from the assessments that may be collected. "Instruments drawn upon a particular fund, whether the fund has already accrued or is to accrue in the future, are not negotiable bills or notes, since they do not carry the general personal credit of the maker and since they are contingent upon the sufficiency of the fund upon which they are drawn": 4 Am. & Eng. Ency. of Law, 2d ed., 87, and authorities there cited. It is needless to extend this opinion or to further cite authorities upon this last proposition, as they are very numerous and entirely uniform.

The judgment of the appellate court and the decree of the superior court are reversed and the cause remanded to the superior court, with directions to that court to dismiss the intervening petition of appellee, and to make such order with reference to the ownership of said warrants as shall conform to this opinion and as justice and equity may require.

HAND, J., dissenting. I think the warrants in question were so far negotiable as to vest title in the Austin State Bank against all persons except the town of Cicero. To hold otherwise would be to impair the commercial value of such warrants, and increase the cost to the property owner of all local improvements in municipalities in this state.

The Misapplication by a Partner of partnership property to the payment of his individual debt is considered in the note to Davis v. Atkinson, 7 Am. St. Rep. 377-380. The general rule is, that a payment of partnership money to satisfy the personal debt of one partner, if made to a person without notice of the source from which it came, does not entitle the firm or any of its members to recover such money. It is otherwise, however, if the payment was received with such notice: Babcock v. Standish, 53 N. J. Eq. 376, 51 Am. St. Rep. 633; Davis v. Atkinson, 124 Ill. 474, 7 Am. St. Rep. 373. See, too, Holmes v. Gilman, 138 N. Y. 369, 34 Am. St. Rep. 463; Oliphant v. Markham, 79 Tex. 543, 23 Am. St. Rep. 363.

On the Negotiability of Municipal Warrants, see First Nat. Bank v. Gates, 66 Kan. 505, 97 Am. St. Rep. 383; Fidelity Trust Co. v. Palmer, 22 Wash. 473, 79 Am. St. Rep. 953, and cases cited in the cross-reference note thereto.

GERBRICH v. FREITAG.

[213 Ill. 552, 73 N. E. 338.]

WILLS—Joint.—Two persons may at the same time unite their wills in a single instrument, if it is such that it may take effect upon the death of one of the parties, so far as it relates to the property of that one. (p. 235.)

WILLS—Joint—Husband and Wife.—The fact that husband and wife devise their property reciprocally to each other by the same instrument, or that it is a joint or mutual will, does not deprive it of validity if the will can be given effect on the death of either so far as the property of that one is concerned. If it is of that character it may be probated upon the death of one as his or her separate will, and, upon the death of the other, can be again proved as the separate will of the other. (p. 235.)

WILLS—Joint.—Unless Provisions of an instrument executed by two persons jointly as their will are such that the disposition of the property is suspended after the death of one until the death of the other, so that it cannot be executed as the separate will of the deceased, it is no objection that the will of both constitutes but one instrument. (p. 236.)

WILLS—Joint—Husband and Wife.—An instrument executed by husband and wife as their joint will, by which each devised his or her property, with the provision that each parcel of land should pass into the hands of devisees at the death of the owner, subject to the requirement that such devisee was to pay to the survivor during his or her natural life the current rate of rent per acre, as well as the taxes and interest on the mortgage, passes a beneficial interest in the land to the survivor, which vests at the death of the owner, and is, in effect, two separate wills, which may be probated separately as the will of each maker, and therefore valid. (p. 236.)

Livingston & Bach, for the appellant.

E. E. Donnelly, for the appellee.

534 **CARTWRIGHT, J.** An instrument in writing executed by Ulrich VonGans and Hannah VonGans, husband and wife, was offered for probate in the county court of McLean county as the will of said Hannah VonGans, who died February 15, 1903, leaving surviving her, her said husband, Ulrich VonGans, five children by her former husband, Freitag, and Henrietta Ernestine VonGans, named in the instrument as the daughter of said Ulrich and Hannah. Appellant, who is one of the children of the former marriage and who was given by the instrument one dollar, with the statement that she had received other valuable consideration in advance, objected to the probate of the instrument as a will, both because it was not executed according to law and because it was not such an instrument as could be probated as

the will of Hannah VonGans. The county court admitted the will to probate, and appellant appealed to the circuit court, where it was again admitted to probate, and this is an appeal from the order of the circuit court.

The objection made in the instrument is that it is a joint will, incapable of being probated as the will of Hannah VonGans while the other maker, Ulrich VonGans, is living. Two ~~are~~ persons may at the same time execute separate wills disposing of their property, and there is no legal objection to uniting the wills in a single instrument if it is such that it may take effect upon the death of one of the parties so far as it relates to the property of that one. The fact that husband and wife devise their property reciprocally to each other by the same instrument, or that it is a joint or mutual will, does not deprive it of validity if the will can be given effect on the death of either so far as the property of that one is concerned. If it is of that character it may be probated upon the death of one as his or her separate will, and upon the death of the other can be again proved as the separate will of the other. Unless the provisions of the instrument are such that the disposition of the property is suspended after the death of one until the death of the other, so that it cannot be executed as the separate will of the deceased party, it is no objection that there is but a single instrument: *In re Davis*, 120 N. C. 9, 58 Am. St. Rep. 771, 26 S. E. 636, 38 L. R. A. 289; *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477; *Estate of Cawley*, 136 Pa. St. 628, 20 Atl. 567, 10 L. R. A. 93; *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751.

In this case the instrument was declared by the parties to be their joint last will and testament. Hannah VonGans was the owner of two hundred and eighty acres of land, and also of an undivided one-half of one hundred and nineteen acres of which she and her husband, Ulrich VonGans, were tenants in common, he owning the other undivided one-half. These lands were their only property. The will provided that the just debts and funeral expenses of the makers should be paid, including a mortgage for ten thousand dollars on the lands, and directed that the five children to whom the lands were devised should each assume the sum of two thousand dollars, or such equalized portion of the mortgage as might remain unpaid at the time of their death. The lands were devised to four of the children of Hannah VonGans, excluding appellant, and to Henrietta Ernestine VonGans, in tracts of eighty acres each

except one tract which was seventy-nine acres. One of the daughters was to pay to John Freitag, one of the sons, a note ⁵⁵⁶ given to the testator and testatrix for cash loaned to her husband. The will contained the following provision: "Each parcel of said land to pass into the possession of our devisees at our, one or the other, demise, and each devisee to pay the survivor a current rate of rent per acre on said land so devised during his or her natural life, together with the taxes, interest on mortgage," etc.

The will was written by a friend of the parties who had been in the grocery business and who was unskilled in such matters. They had been in the habit of trading with him, and he wrote the will from deeds furnished by them. While the forms of expression used are not the same as would have been employed by one more experienced in writing wills, we find no especial difficulty in determining the intent of the parties. By the will each one devised his or her own property, with the provision that each parcel should pass into the hands of the devisees at the death of the owner, but such devisee was to pay to the survivor, during his or her natural life, the current rate of rent per acre, as well as the taxes and interest on the mortgage. The possession being subject to the payment of the current rate of rent, together with the taxes and interest on the mortgage or such part as might remain unpaid, the survivor would be entitled to the full beneficial use of the land for his or her life. That beneficial use in the lands devised by Hannah VonGans became vested in Ulrich VonGans upon her death, and it would only come to an end and the land be freed from the rent charge upon his death. There is nothing in these provisions which suspended the disposition of the property or the operation of the will until the death of Ulrich VonGans, but the instrument is, in effect, two distinct wills, which may be probated separately and be successively proved as the separate will of each maker.

It is claimed that the proof did not show a legal execution of the will. The evidence was that the makers of the will were Germans but they understood English. The person ⁵⁵⁷ who drew the will read it to them in English and also explained it in German. He called in the witnesses, and asked the makers if they were satisfactory and if they should sign as witnesses, and the makers gave their assent by nodding their heads. The makers of the will took it away with them

and kept it six or seven years and the evidence sufficiently proves that they understood its contents and executed it in accordance with the law.

Appellant offered the testimony of herself and her husband that one of the witnesses testified differently on the application to probate the will in the county court from his testimony in the circuit court as to whether the will was signed before he was called in as a witness. An objection to the offer was sustained. If this testimony had been admitted it could not have affected the result. In fact, appellant proved by a third subscribing witness to the will that the man who drew it called the witnesses into the room and introduced them to the testator and testatrix and stated that they had drawn their will and wanted the witnesses to acknowledge it, and they nodded their assent.

Appellant also offered to prove by Ulrich VonGans that after the will was drawn and presented to him for signature he refused to sign until he was assured he was to receive the property in case of his wife's prior death. Ulrich VonGans was not present at the trial, but the objection was not upon that ground, and it is insisted that the court erred in refusing to entertain the offer. The question whether any fraud was practiced upon Ulrich VonGans was not involved in the offer to probate the will of Hannah VonGans, and the offered evidence would not tend to prove that she was deceived in any manner. Besides, as we interpret the will, it gave him the full beneficial use of the property during his lifetime, and he was not deceived if that representation was made to him.

The judgment of the circuit court is affirmed.

Joint Wills are discussed, in respect to their validity and effect, in the note to *Lewis v. Scofield*, 68 Am. Dec. 407-410. It is said in *Walker v. Walker*, 14 Ohio St. 157, 82 Am. Dec. 474, that a joint will is unknown to the testamentary law of this country. But in *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477, it is held that tenants in common of land, owning personal property in severalty, may make a joint will disposing of all their property severably, which will take effect on the death of all. And in *In re Davis' Will*, 120 N. C. 9, 58 Am. St. Rep. 771, it is held that a paper purporting to be the joint will of the two persons executing it as such, and whereby they devise and bequeath property to a third person, cannot, upon the death of one, be proved as the will of both, but may be probated as the will of the decedent.

BIGGINS v. LAMBERT.

[213 Ill. 625, 73 N. E. 371.]

WILLS—Construction.—A will devising certain real estate and all personal property to the widow of the testator, with direction that she provide, before her death, for two named children, "out of the above-described property," does not compel her to divide the property equally between them nor prevent her from giving the land to one and the personalty to the other. (p. 240.)

FRAUDULENT CONVEYANCES.—Fraudulent Grantee.—If a deed is in fraud of a judgment creditor of the grantor, and both he and the grantee participate in the fraud, the grantee, as against such judgment creditor, is not entitled to protection to the extent of the consideration paid for the property. (p. 242.)

APPELLATE PRACTICE—Disqualification of Judge.—If a judge from whom a change of venue is taken on the ground of prejudice subsequently sits as a member of the appellate court in judgment on the case, that is no ground for reversal. (p. 242.)

W. P. Black and J. W. Downey, for the appellant.

J. L. O'Donnell, for the appellee.

⁶²⁵ **RICKS, C. J.** This is an appeal from a judgment of the appellate court for the second district affirming a decree of the circuit court of Will county setting aside, as fraudulent as to the rights of appellee, a certain deed from John Ward to Elizabeth ⁶²⁶ Biggins, his sister, the appellant herein. The appellee had recovered in said circuit court a judgment for five thousand dollars in an action of tort against the said John Ward for the seduction of his daughter, Catherine Lambert. Execution having been issued on said judgment and returned unsatisfied, the appellee herein began this suit for the purpose of setting aside the deed above referred to and subjecting the property purporting to be conveyed by said deed to the satisfaction of said judgment. The relief prayed in appellee's bill was decreed by the circuit court, and on appeal to the appellate court that decree was affirmed, and now this further appeal is prosecuted, it being contended by appellant that the circuit and appellate courts erred both in the application of law and the finding of facts.

The father of John Ward, Daniel Ward, originally owned the land here in controversy. He died October 24, 1897, leaving a last will and testament, by which he made certain devises to all his children except John and Elizabeth, the defendants in his suit. As to them, however, mention was made in the

third clause of the will, which, together with the fourth clause, is as follows:

"Third—I give and bequeath to my wife, Catherine Ward, the real estate described as W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, sec. 5, 40 acres, and the W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, sec. 5, 81.14 acres, and all appurtenances on the premises of every kind, including all the personal property, household furniture and farm implements, and livestock, grain, corn, oats, hay, straw, fowl, all cash money on hand, in whosoever hands it may be, and all notes. The real estate above described is in town of Lockport, 36, range 10 east, Will county, Illinois. I hereby ordain that my wife, Catherine Ward, shall provide, before her death, out of the above-described property, for my two children, John Ward and Elizabeth Biggins.

"Fourth—I ordain and appoint my wife, Catherine Ward, executrix of this my last will and testament, to serve without bond."

On January 12, 1900, Catherine Ward, the mother of appellant, at her home, executed to John Ward a deed to the west half of the northwest quarter and the north half of the west half of the southwest quarter of section 5, township 36 north, range 10 east of the third principal meridian, in the township of Lockport, Will county. It seems to have been conceded in the previous proceedings that the description given in this deed is the correct one and covers the same land sought to be described in the third clause of the will above referred to. However that may be, it is the deed afterward executed by John Ward to Elizabeth Biggins, purporting to convey the land last described that is sought to be set aside. The deed from Catherine Ward to John Ward was not recorded until March 12, 1901. On March 11, 1901, John Ward and Elizabeth Biggins went to the office of their attorney, in Joliet, and there John Ward made to Elizabeth Biggins a bill of sale of all the personal property and the homestead, being the land in controversy, where John Ward had been farming since his father's death, the said personal property being estimated to be of the value of three thousand dollars. He also made and delivered to her a deed for this same land and as described in the deed to him from his mother, the expressed consideration being eight thousand dollars, Elizabeth Biggins paying for all this property nineteen hundred dollars in cash, but giving no notes or any other evidence of indebtedness as to the balance of the purchase price. The deed from Catherine Ward to John Ward, which had never been recorded, was, and had been for some time, in the possession

sion of the attorney in whose office the parties were, and who the next day had both the deed to John Ward and the deed to Elizabeth Biggins filed for record.

There is a conflict in the evidence as to when the deed executed by Catherine Ward to John Ward was delivered—whether at the time of its execution or not until the 11th of March, 1901, when the deed of John Ward to Elizabeth Biggins was executed, it being contended on the part of ⁶²⁸ appellant that up to this time the deed to John Ward was being held in escrow by his attorney. We deem it unnecessary for us to enter upon a consideration of this question, as, under the view we take, that question is not vital to our decision.

It is first contended by appellant that “the devise, in the third clause of the will of Daniel Ward, of the real estate involved in this suit, to Catherine Ward, imposed upon the land in her hands a trust in favor of John Ward and Elizabeth Biggins,” and it is insisted that the deed of John Ward to Elizabeth Biggins, on this theory of the case alone, must be sustained, at least to the extent of a one-half interest in the lands, the equitable title to which, it is said, was at the time in appellant under the provisions of her father’s will. For the purpose of this argument it may be conceded that Catherine Ward did take the property devised to her in her husband’s will burdened with the trust of making provision therefrom for the children John and Elizabeth, but after this concession there is nothing in the will or in the authorities cited by appellant to indicate that John and Elizabeth should receive equal shares of this property or that the land should be equally divided between them. In clauses of the will preceding the one set out herein the testator bequeathed to certain children bodies of land of different extent, and there is nothing to indicate, even if it be said that it was the testator’s intention that the land here in controversy should eventually go to his children John and Elizabeth, that they should participate equally therein. The testator left considerable personal property, which, under the third clause of the will, went to the widow, Catherine Ward. Among the items of personal property so left was a note for fifteen hundred and fifty-four dollars and thirty-eight cents, which, with three years’ interest thereon, the evidence shows the widow gave to and the same was collected by Elizabeth Biggins. There is also evidence tending to show that Catherine Ward did provide, out of the property left her by her husband, for the children Elizabeth and John, and by which ⁶²⁹ provision Eliza-

beth was to receive, or had received, her share in money and John was to have the farm, and in accordance with that provision the farm was deeded to John by his mother. If the chancellor before whom the case was tried believed the evidence introduced on behalf of appellee, he was justified in believing that there was an arrangement to this effect, and if so, then appellant's position that the property devised in the third clause of the will was burdened with a trust provision for said children may be conceded and still the decree of the lower court is not subject to attack on the ground that the court misconstrued the clause of the will in question, for there is nothing in that clause from which the inference can logically be drawn that it was incumbent upon Catherine Ward to provide, out of the means left her, shares similar in nature and amount for the two children named in said clause. If Catherine Ward considered it better that the land should go to John and that Elizabeth should receive her share in money, as the evidence tends to show the division was made, under the will she had a right to so divide the estate; and if the chancellor believed, from the evidence, that after such division had been made and John Ward had become invested with the title to the land in question he fraudulently conveyed the same to his sister, Elizabeth, who was also guilty of complicity in said fraud, then the decree is not erroneous.

It is further contended by the appellant that the evidence fails to show any guilty intent or knowledge on the part of Elizabeth Biggins, or even any fraud on the part of John Ward, as to this conveyance, each of which is necessary to be shown in order to impeach and set aside the deed in question. In the consideration of this point it is not necessary that we set out the evidence tending to support the findings of the chancellor as to the existence of fraud. We have carefully reviewed the evidence presented by the abstract furnished us. It is very conflicting. There is evidence which, if believed by the chancellor, amply justifies the conclusions ³³⁰ reached by him. He saw and heard the witnesses, and had much better opportunity for judging as to the weight that should be attached to the testimony of the various witnesses than have we. Under such circumstances the rule is well settled that this court will not disturb the findings of the chancellor unless manifestly and palpably wrong. We cannot say, from the evidence before us, that the conclusions reached by the chancellor are manifestly erroneous. Leaving out of consideration the conflicting state-

ments of the witnesses, many circumstances about which there is no question appear that of themselves are strong badges of fraud.

Appellant also contends that the conveyance should in no event be set aside for more than the excess of the value of the property over the consideration actually paid, on the theory that, as to appellant, the conveyance cannot be held to be, at most, more than constructively fraudulent. As we have said, there is evidence, in our judgment, tending to establish guilty knowledge or intent on the part of appellant, and if she participated in the fraud then she cannot be afforded any relief, and while the transfer was void as to third parties, yet as between the parties to the transaction it will be regarded as binding: 14 Am. & Eng. Ency. of Law, 2d ed., 273.

Finally, it is suggested that because a change of venue in the circuit court was taken from one judge on the ground of prejudice, and that same judge afterward sat as a member of the appellate court before whom this case was taken, that was prejudicial error. We do not think so. The appellate court was composed of three judges, at least two of whom were not subject to the objection made.

Upon the review of the record before us we find no reversible error, and the judgment of the appellate court is affirmed.

When a Conveyance is in Fraud of Creditors, the law will not aid either of the parties, if in *pari delicto*, but will leave them where they have placed themselves, without relief: *Williams v. Clink*, 90 Mich. 297, 30 Am. St. Rep. 443; *Brady v. Huber*, 197 Ill. 291, 90 Am. St. Rep. 161; *Kirby v. Reynes*, 138 Ala. 194, 100 Am. St. Rep. 39. As between them, the conveyance is valid: *Steinmeyer v. Steinmeyer*, 64 S. C. 413, 92 Am. St. Rep. 809; *Preston-Parton Mill Co. v. Dexter*, 22 Wash. 236, 79 Am. St. Rep. 928; *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116. A fraudulent vendee whose title is annulled by a court of equity is not entitled to be reimbursed for purchase money paid by him of his own wrong and in furtherance of an actual fraud: *Connecticut Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656. See, too, the monographic note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 503; *Mallow v. Walker*, 115 Iowa, 238, 91 Am. St. Rep. 158.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

WEIL v. STONE.

[33 Ind. App. 112, 69 N. E. 698.]

CONTRACTS—When Severable.—A contract for the sale of skins, setting out several distinct classes to be furnished and the price to be paid for each class, is severable, and entitles the purchaser to rescind the contract for fraud as to part of the items, and recover the price paid therefor. (p. 247.)

CONTRACTS—Rescission.—A Complaint in an action to rescind a contract for the sale of goods on the ground of fraud, averring that the articles shipped were inferior in quality to those specified in the contract, and were not marketable in their condition as shipped, is sufficient in the absence of a motion to make more specific. (p. 247.)

CONTRACTS—Rescission in Part—Evidence of Value.—If it is sought to rescind a contract for the sale of goods on the ground of fraud as to part of the goods delivered, and to recover the purchase price thereof, evidence of the value of that part of the goods is immaterial. (p. 248.)

JURY AND JURORS.—Jurors cannot impeach their own verdict. (p. 248.)

J. M. Barrett, S. L. Morris, B. K. Elliott, W. F. Elliott and F. L. Littleton, for the appellants.

T. E. Ellison, for the appellees.

¹¹² **HENLEY, C. J.** Appellees in this case recovered a judgment against appellants growing out of the alleged violation of a certain written contract. The material averments of the second paragraph of the complaint upon which the cause was tried are that appellees are partners, doing business in the cities of Boston and New York, and engaged in buying and selling different kinds of skins, and that appellants are likewise

engaged in the same business in the city of Fort Wayne; that in the month of March, 1898, appellees were informed by appellants that they had an extra fine lot of sheepskins which they desired to sell, and pursuant to such notice, one of appellees called on appellants at their place of business in Fort Wayne, and appellees' representative went with appellants to where the sheepskins were stored, and found such skins done up in large packages of a dozen or more, containing about seven hundred dozen, all different grades and quality; that appellants exhibited samples of the various skins to appellees' agent, and then and there represented that all the skins proposed to be sold were what are known to the trade as "packers' skins" and "fine packers'" skins; that the term "packers' skins" is used to designate skins removed from animals in large slaughter-houses, and are free from defects, and are cleaner and better cured, and can be worked into better leather than the skins which were known as "country skins."

It is further averred that appellees and appellants entered into a contract, a copy of which contract is made a part of the complaint, by which appellants agreed properly to pack and ship the skins to Boston, and stating the price which appellees were to pay for them; that while the negotiations were in progress, it was discovered that there ¹¹⁴ were not enough sheepskins to make a carload, and that thereupon appellants represented that they had about one hundred and fifty dozen "A or No. 1" hogskins and about the same quantity of "B or No. 2" hogskins which were in process of tanning, and would soon be ready for delivery; that such hogskins were in large vats, covered with liquor, or piled on the floor undergoing the process of being prepared for the market; that the hogskins were in such condition that appellee could not make an examination of them, and, in order that appellees might know the character of the hogskins, appellants exhibited to them several samples; that the skins so exhibited were large, perfect skins, such as are known to the trade as "A or No. 1 skins"; that appellants agreed to prepare the hogskins so that they would conform in character to the samples exhibited, and appellees agreed to buy and pay therefor at the rate of \$5.50 per dozen for No. 1 skins, and \$3 per dozen for No. 2 skins; that appellants accepted said offer, and agreed to grade, pack, and ship the skins to Boston, subject to appellees' inspection and count.

It is further averred that under such contract various skins shipped to appellees at Boston, and that before the same

were received and examined appellees honored appellants' draft of \$2,812.44; that a few days after the receipt of the draft, upon examination of the goods shipped, they were found to be defective and not according to sample, and thereupon appellees offered to return all the property so shipped, but appellants refused to accept or permit the return of the goods. It is further alleged that the shipped skins were so packed that the immediate discovery of the defects was impossible, and that upon investigation afterward it was discovered that appellants had stuffed the interior of the casks in which the skins were shipped with inferior sheepskins, not conforming to the samples shown appellees, nor to the quality designated in the contract; that the money advanced to appellants by the payment ¹¹⁵ of the draft aforesaid was procured by the fraud, deceit, and misconduct of appellants. It is further averred that the hogskins shipped were not sufficiently cured for their proper preservation; that they were not of the quality purchased or designated in the contract; that appellees refused to accept them, and immediately notified appellants of such fact, and demanded the repayment of the money advanced to them upon that account; that the hogskins were at once reshipped to appellants, and appellants refused to receive them; that the representations made by appellants in regard to the quality of the skins proposed to be shipped were falsely and fraudulently made, and that appellants knew when such representations were made that the same were false. It is also shown by the complaint that appellees retained the sheepskins and sold them. The following is a copy of the contract between appellants and appellees out of which this controversy arose:

"Messrs. Stone, Timlow & Co., New York City.

"Gentlemen: We offer you as follows: The quantities are approximate, to be more or less, all F. O. B. Ft. Wayne, Indiana. 6 to 10 doz. XXXX sheep at \$5 per doz., 25 to 35 doz. XXX sheep at \$4.25 per doz., 25 doz. XX sheep at \$3.50 per doz., 75 to 100 X sheep at \$3 per doz., 20 to 30 doz. No. 1 sheep at \$2.75 per doz., 150 to 175 doz. XXX ribby sheep at \$2.37½ per doz., 15 to 25 doz. XX ribby sheep at \$1.75 per doz., 6 to 10 doz. XXX blind ribby sheep at \$3 per doz., 5 to 10 doz. broken grain sheep at \$4 per doz., 40 to 50 doz. cull sheep at \$1.25 per doz., 10 to 15 XX lambs at \$3.25 per doz., 10 to 20 doz. X lambs at \$2.50 per doz., 50 to 75 doz. No. 1 lambs at \$2.37½ per doz., 30 to 50 doz. No. 2 lambs at \$1.50 per doz., 75 to 100 doz. ribby lambs at \$1.62½ per doz., 40 to 60 doz. cull lambs at 50c. per

doz., 125 to 150 doz. A hogskins at \$5.50 per doz., 125 to 150 doz. B hogskins at \$3 per doz. Shipment to be made to Boston, Massachusetts, invoice and B. L. to be sent to 4 Warren St., New ¹¹⁶ York City. Terms, draft for ninety per cent, balance to be remitted upon receipt of the stock.

"Yours truly,

"THE FT. WAYNE SHEEPSKIN & WOOL CO.

"A. WEIL, Pres.

"Accepted:

"STONE, TIMLOW & CO.

"Per A. H. STONE."

Appellants' demurrer to the complaint was overruled, and the cause put at issue by appellants' general denial to the complaint. There was a trial by jury, and a verdict and judgment in favor of appellees in the sum of \$1,183.55. With the general verdict the jury returned answers to interrogatories. The errors assigned and discussed relate to the action of the trial court in overruling appellants' demurrer to the complaint, in overruling their motion for a new trial, and in overruling their motion for judgment upon the special finding of facts notwithstanding the general verdict.

It is contended by counsel for appellants that this is an action to rescind a contract on the ground of fraud and deceit, and that the contract must be regarded as an entirety, and not severable; and that the complaint showing, as it does, that a part of the goods purchased under the contract were retained by appellees, and sold, renders the complaint insufficient; and that the complaint is insufficient for the further reason that the contract shows upon its face that the goods were delivered to appellees in Fort Wayne, and that the inspection and the grading and the examination of the goods sold under the contract must, by the terms of the contract be made at Fort Wayne, and not at Boston. It is upon appellants' theory and contention that the complaint is one to rescind and recover back money paid that we will proceed to examine the question of its sufficiency.

If the contract must be regarded as indivisible, appellants' argument and objection to the complaint is well taken; but under the authorities we think the contract is one clearly severable. The contract in this case rests upon a consideration susceptible of distinct apportionment. It ¹¹⁷ consists of several distinct items to be furnished by one party, and the price to be paid by the other party is apportioned to each item. In 2 Parsons on

Contracts, ninth edition, *517, it is said: "If the part to be performed by one party, consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." In *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255, the court said: "Where, however, a contract is divisible, one part having no necessary relation to the other, each resting upon a consideration peculiar to itself, and independent of the other, the injured party may retain the subject of one part, and, having tendered the consideration or benefit received, may treat another part as rescinded at law, or he may maintain a suit in equity to rescind one part upon equitable terms, while adhering to another independent part": *Lucasco Oil Co. v. Brewer*, 66 Pa. St. 351. In *Kirkland v. Oates*, 25 Ala. 465, the court said: "A severable contract is one the consideration of which is, by its terms, susceptible of apportionment on either side so as to correspond to the unascertained consideration on the other side." We think the cases cited state the rule of law correctly as applicable to contracts of the class to which the one in controversy here belongs, and place it squarely within the class of severable contracts.

The complaint, after averring specifically the defects in the hogskins shipped appellees under the contract, and that the quality shipped was inferior to the quality specified, avers, in substance, that the hogskins were not marketable in the condition they were in when so shipped by appellants and received by appellees. This averment, however imperfect it may be, was a sufficient averment that the quality of the goods shipped, at the time and place of their shipment, was inferior to the quality specified in the contract. If appellants desired a more specific averment upon this subject, their remedy was by motion to ¹¹⁸ make more specific, and not by demurrer. The averment was sufficient, under which evidence might have been admitted to prove the quality of the goods at the place of shipment. We think the complaint states a cause of action upon the theory on which appellants contend it proceeds. The same questions arise upon appellants' motion for judgment on the answers of the jury to the interrogatories as arise upon the complaint, and a further discussion is unnecessary. The evidence shows that the sale of the goods was by sample, and while, under the contract, the title to the property was in appellees in Fort Wayne, the examination and delivery was to be in Boston, the place to which the goods were

shipped, and this we think clearly appears from the contract itself.

The next question presented by counsel arises upon the action of the trial court in admitting certain evidence in regard to the value of the goods in Boston at the time they were received. Mr. Stone, one of the appellees, was permitted to answer the following question, propounded to him by counsel: "Mr. Stone, you may state what the value per dozen would be or was in Boston at the time those goods were received—the A hogskins of the character and quality that were shown to you by Mr. Weil." Appellants' objection to this question was that the market value of these goods in Boston was entirely immaterial, as the contract provided for their delivery in Fort Wayne; and that the only evidence admissible to show the value of the goods would be evidence to prove the market value of the goods at the time they were delivered in Fort Wayne, and that the difference between that value and the contract price would be the measure of damages. This action, regarded as an action to rescind a part of the contract, which is the theory upon which counsel for appellants insist the action proceeds, results in making evidence of the value of the property returned immaterial. The contract, in so far as it relates to the sale of the hogskins, was rescinded, and the ¹¹⁹ goods returned to the vendors at Fort Wayne. The contract in that respect having been rescinded, and the goods returned, evidence as to the market value of the goods of the quality specified in the contract, either at Boston or Fort Wayne, could not affect the result.

Another cause stated in appellants' motion for a new trial brings in question alleged misconduct on the part of the jury. Counsel insist that it was reversible error upon the part of the jurors in listening to comments made by members of the panel to the effect that appellants were Jews, and unworthy of belief, and that one of appellants' witnesses had attempted to defraud an insurance company by burning his own property. The affidavits of three of the jurors appear in the record in support of this reason. The supreme court has in numerous cases held that a juror cannot impeach his own verdict: *Stanley v. Sutherland*, 54 Ind. 339; *Houk v. Allen*, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706; *Barlow v. State*, 2 Blackf. 114.

It appears from the whole record that the case was fairly tried and determined.

Judgment affirmed.

A Contract is Severable if the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item, or is left to be implied by law; but a contract is entire if the consideration is single and entire, although the subject thereof consists of distinct and independent items: *Fullmer v. Poust*, 155 Pa. St. 275, 35 Am. St. Rep. 881. A contract is not entire because embraced in one instrument, if it provides for the sale and purchase of different kinds of articles, and the prices are different and specific for each kind: *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831.

The Affidavits of Jurors, it is often said, will not be received to impeach their verdict: *Southern Nevada etc. Min. Co. v. Holmes Min. Co.*, 27 Nev. 107, 103 Am. St. Rep. 759; *Weatherford v. State*, 31 Tex. Cr. Rep. 530, 37 Am. St. Rep. 828; *Palmer v. People*, 138 Ill. 356, 32 Am. St. Rep. 146; *Wray v. Carpenter*, 16 Colo. 271, 25 Am. St. Rep. 265; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20. But this rule is not universally accepted: *Gordon v. Trevarthan*, 13 Mont. 387, 40 Am. St. Rep. 452; *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 646; *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. Rep. 818; *notes to Packard v. United States*, 48 Am. Dec. 377; *Crawford v. State*, 24 Am. Dec. 475.

CITIZENS' STREET RAILROAD COMPANY v. CLARK.

[33 Ind. App. 190, 71 N. E. 53.]

STREET RAILROADS—Assault on Passengers.—A street-car company is bound to protect a passenger from an assault and injury by its servants, and its liability for a breach of such duty does not depend upon the assault being committed by one acting within the scope of his employment. (p. 250.)

STREET RAILROADS—Transfers and Rights Thereunder.—A passenger on a street-car having paid his fare and requested a transfer to some other line of the company, to which he is entitled to transfer, and by mistake having been given a wrong transfer, is nevertheless entitled, upon proper explanation, to be carried upon the line to which he requested a transfer. (p. 250.)

STREET RAILWAYS—Assault upon Person on Car.—If unnecessary and excessive force is used in ejecting a person from a street-car, he is entitled to recover for an assault whether he is entitled to the rights of a passenger or not. (p. 251.)

F. Winter, C. Winter and W. H. Latta, for the appellant.

J. M. Bailey, for the appellee.

¹²¹ **ROBY, J.** Action by appellee. Verdict and judgment for five hundred dollars. Motion for a new trial overruled. Judgment on verdict. The errors assigned challenge the action of the trial court in overruling appellant's demurrer to the fourth and fifth paragraphs of complaint and its motion for a

new trial. 'The substance of the fourth paragraph was that appellee was a passenger upon one of appellant's street-cars, and that he was, before he reached his destination, unlawfully assaulted, and ejected from the car, and beaten, to his damage. The fifth paragraph is not materially different. It is averred in them both that the appellant was a corporation organized under the law of this state and engaged in operating a street railway for hire in the city of Indianapolis, and that "the defendant, by its agents, servants, and employes, assaulted and beat" etc. The objection made is that the acts of the employes are not shown to have been done in the course of their employment or in furthering the master's business.

The averment that the assault was committed by the defendant through its employes is sufficient as a matter of pleading: *Wabash etc. Ry. Co. v. Savage*, 110 Ind. 156, 159, 9 N. E. 85; *Feighner v. Delaney*, 21 Ind. App. 36, 51 N. E. 379. Appellee being a passenger on its car, appellant owed the duty to protect him from assault and injury by its servants, its liability for breach of such duty not depending upon the assault being committed by one acting within the scope of his employment: *Indianapolis Union Ry. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; *Baltimore etc. Ry. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Ry. 166, 46 N. E. 554. The demurrer was therefore properly overruled.

¹⁹² The point is made that the evidence fails to show that appellee was on a car operated by appellant: *Citizens' St. Ry. Co. v. Stockdell*, 159 Ind. 25, 62 N. E. 21. The action was brought against the Citizens' Street Railroad Company. It appeared, filed answer, and made defense. It was admitted during the trial that such company was at the time of the accident complained of engaged in hauling passengers for hire in the city of Indianapolis. The evidence shows the occurrence to have taken place upon one of the streets of said city, and that appellee was ejected with some force from one of the "company's" cars by the "company's" employes. Many references are made to the "company" by the witnesses. The inference that the appellant corporation was the company referred to was one the jury might, we think, properly draw.

The testimony relative to the issuance of a transfer ticket was of the same character so far as appellant's connection therewith was concerned. Appellee testified that he paid his fare to the conductor of a North Illinois street-car, and requested a transfer to a Blake street-car, and, supposing he had received it,

boarded a Blake street-car, from which he was forcibly ejected, it appearing that the transfer slip delivered to him was for the West Michigan street line. "The claim agent of the company" gave the motorman and conductor of the car from which appellee was ejected orders to start, and it was probably a fair inference that the transfer slip was issued by appellant. The second instruction given by the court was to the effect that if appellee paid his fare to the conductor of the Illinois street-car, and asked for a transfer to some other line belonging to the company to which he was entitled, and the conductor, by mistake, gave him a wrong transfer, he would, nevertheless, be entitled, upon proper explanation, to be carried upon the line to which he had requested a transfer. The instruction accords with the decisions in *Evansville etc. Ry. Co. v. Cates*, 14 Ind. App. 172, 41 N. E. 712, and *Indianapolis St. Ry.* ¹⁹³ *Co. v. Wilson*, 161 Ind. 153, 100 Am. St. Rep. 261, 66 N. E. 950. If appellee was not entitled to the rights of a passenger under the evidence, such fact would not authorize the reversal of the judgment, it appearing that unnecessary and excessive force was used in ejecting him from the car: *Baltimore etc. Ry. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Rep. 166, 46 N. E. 554.

The motion for a new trial was correctly disposed of, and the judgment is affirmed.

Comstock, J., concurs in the conclusion.

A Carrier is Liable to a Passenger for an assault committed on him by an employé acting beyond the scope of his employment: *Birmingham etc. Ry. Co. v. Baird*, 130 Ala. 334, 89 Am. St. Rep. 43, and cases cited in the cross-reference note thereto; monographic note to *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 95. See, too, *Lexington Ry. Co. v. Cozine*, 111 Ky. 799, 98 Am. St. Rep. 430; *Gillespie v. Brooklyn Heights R. R. Co.*, 178 N. Y. 347, 102 Am. St. Rep. 503. And compare *Central of Georgia Ry. Co. v. Motes*, 117 Ga. 923, 97 Am. St. Rep. 223; *Georgia R. R. etc. Co. v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39.

If a Passenger on a Street-car, when he calls for a transfer over a certain line, is given a transfer over a different line, the carrier is liable to him in damages if he is expelled, over his reasonable explanations, from the car when he tenders the transfer and refuses, on its rejection, to pay an additional fare: *Indianapolis St. Ry. Co. v. Wilson*, 161 Ind. 153, 100 Am. St. Rep. 261, but see the cases cited in the cross-reference note thereto.

RARIDEN v. RARIDEN.

[33 Ind. App. 284, 70 N. E. 398.]

DIVORCE—Remarriage—Waiver of Right to Prosecute Appeal
 If a man to whom a divorce has been granted appeals from a judgment against him for alimony, and remarries pending such appeal, he thereby waives his right to prosecute the appeal, and it will be dismissed. (p. 254.)

R. P. Davidson and A. Boulds, for the appellant.

J. F. Hanly and W. R. Wood, for the appellee.

284 ROBINSON, J. Appellee sued for divorce. Appellant answered in denial, and filed a cross-complaint asking a divorce. Appellee answered the cross-complaint in denial. Upon a trial the court denied appellee's petition, and **285** granted appellant a divorce upon his cross-complaint, and gave judgment against him in appellee's favor for alimony, and an allowance for attorney's fees. Appellant's motion to modify the judgment by reducing the amount of alimony and allowance was overruled, and exception taken. His motion for a new trial upon the question of alimony and allowance only was overruled. He has assigned as error the court's refusal to modify the judgment as to alimony and allowance, and the refusal of a new trial.

Appellee moves to dismiss the appeal upon a showing that, since the submission of the cause, appellant remarried, and that he and the woman he married are now living together as husband and wife.

"Alimony," as here used, is purely incidental to a divorce proceeding, and is an allowance out of the divorced husband's estate made to the divorced wife for her support and maintenance. In this state it has no existence as a separate and independent right. It must be adjudged, if at all, in the divorce proceedings, and cannot be the subject matter of an independent suit. The court is required to make such decree for alimony as the circumstances of the case shall render just and proper: Burns' Rev. Stats. 1901, sec. 1057. The court bases its decree for alimony upon all the facts and circumstances disclosed in the divorce proceedings, including all matters of property which have transpired between the parties: Muckenbarg v. Holler, 29 Ind. Am. Dec. 345.

"Justifying alimony," said the court in Hedrick v. Hedrick, 291, "all the evidence in the case ought to be considered, and then the subject is often a difficult

one. It is not yet controlled by definite rules, and the determination of each case must, therefore, depend upon its own circumstances and an enlightened sense of justice and public policy." And it has been held that the appellate tribunal cannot say that alimony in a case is excessive, in the absence of the testimony on which the divorce was granted: *Ifert v. Ifert*, 29 Ind. 473.

²⁸⁶ In *Hedrick v. Hedrick*, 128 Ind. 522, 26 N. E. 768, it was held that in determining the amount of alimony the court may "inquire into the circumstances of the parties and ascertain the amount of property owned by the husband at the time, the source from whence it came, the ability of the husband to pay by reason of his financial circumstances, his income, and his ability to earn money as well as his inability to earn money on account of ill-health, and upon a full investigation it is the duty of the court to make such an allowance for alimony as is just and proper."

In fixing the amount of the alimony the court may consider the conduct of the husband and the wrongs perpetrated by him upon the wife: *Gussman v. Gussman*, 140 Ind. 433, 39 N. E. 918. In all the authorities the fact is emphasized that alimony is an incident of the divorce. While it is, in a sense, a separate judgment, and may be in a particular case modified or disallowed by the appellate tribunal without in any way affecting the decree of divorce, yet, in another sense, it is in no manner a judgment separate and apart from the decree of divorce, as a reversal of the decree of divorce, in and of itself, sets aside the judgment for alimony. And while the appellate tribunal, upon an appeal for that purpose only, may make such modifications of the allowance of alimony as right and justice require, it may also, upon an appeal by the party who secured the divorce and who questions only the allowance of alimony, reverse the decree of divorce and remand the case for the trial court to hear and consider the entire case de novo.

In *Yost v. Yost*, 141 Ind. 584, 41 N. E. 11, appellant was granted a divorce and was awarded one hundred dollars alimony, and appealed, and questioned only the amount of alimony and the court's refusal to allow any sum as attorney's fees in the prosecution of her petition. It was held that the trial court, as to these matters, did not exercise a proper judicial discretion; and the case was reversed both as to the decree of divorce and as to the alimony, and a new trial ordered ²⁸⁷ upon all issues. The court, by Jordan, J., said: "As this court, in the exer-

of appellate jurisdiction, has the power to so mold its judgments and mandates as to secure the proper relief, or justice, to the party or parties entitled thereto, we should much prefer to exercise that power in order to provide a way by which this result might be obtained without disturbing that part of the decree divorcing the parties. But, as the value of the property owned by appellee may have changed since the judgment was originally rendered and likewise the circumstances and conditions of both parties, it will be proper and right, and better, perhaps, we think, subserve the ends of justice for the lower court to hear and consider the entire case de novo." That is to say, when, in the case at bar, appellant appealed from the judgment for alimony and allowance for attorney's fees, he placed it within the power of the appellate tribunal, if a consideration of the case showed that justice required it, to reverse the case not only as to the alimony and allowance, but also as to the decree of divorce, and direct a new trial upon all the issues.

Whether, upon the whole record in this particular case, justice would or would not require that the trial court should consider the entire case de novo, is not material, as it is necessary that a general rule should be declared. Under the above authority it might be necessary in any case to reverse that part of the judgment and decree granting the divorce. But by his marriage, by which he has accepted the benefits of that part of the decree, he has made it impossible for the court to do what the justice of the case might require that it should do. He has accepted the benefits of a particular part of a judgment, which might or might not be permitted to stand upon an adjudication of the question he is urging by his appeal, and by so doing has waived his right to prosecute his appeal: See *Garner v. Garner*, 38 Ind. 139; *Stephens v. Stephens*, 51 Ind. 542; *Sterne v. Vert*, 108 Ind. 232, 9 N. E. 127; *McGrew v. Grayston*, 288 144 Ind. 165, 41 N. E. 1027; *Manlove v. State*, 153 Ind. 80, 53 N. E. 385; *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151; *Keller v. Keller*, 139 Ind. 38, 38 N. E. 337.

The appeal is dismissed.

The Right to Appeal is generally waived by accepting a benefit under the judgment: *Tyler v. Shea*, 4 N. Dak. 377, 50 Am. St. Rep. 660; note to *Clark v. Ostrander*, 13 Am. Dec. 548. See, however, *Fiedler v. Howard*, 99 Wis. 388, 67 Am. St. Rep. 865. Thus, where a decree of divorce and alimony was pronounced against a person, and he afterward contracted a second marriage, it was held that, having availed himself of the benefits of the decree, he must bear its burdens, and could not, therefore, appeal from it: See the note to *Clark v.* 13 Am. Dec. 548.

BOLDT v. EARLY.

[33 Ind. App. 434, 70 N. E. 371.]

SPECIFIC PERFORMANCE—Discretion of Court.—The awarding of specific performance by a court of equity is a matter, not of absolute right, but of sound discretion. (p. 260.)

SPECIFIC PERFORMANCE—Burden of Proof is upon plaintiff in a suit for specific performance to show a full and complete performance on his part, or an offer of such performance. (p. 260.)

CONTRACT OF SALE—Time as Essence of.—Though time is not of the essence of a contract for the sale of land originally, it may be so rendered by the conduct of the vendor or vendee subsequent to the making of the contract. (p. 260.)

VENDOR AND PURCHASER—Contracts of Sale—Time as Essence of Specific Performance.—If there has been considerable increase in the value of the land after the failure of the vendee to pay an installment of the purchase price at the time stipulated in the contract of sale, this, together with notice that if payment is not made by a specified time, the land will be resold, and failure to comply with such notice may be sufficient reason for denying him specific relief. (pp. 264, 265.)

F. E. Osborn and W. A. McVey, for the appellant.

F. R. Liddell and T. E. Howard, for the appellee.

435 BLACK, J. The appellee sued the appellant for specific performance of a contract for the sale of land. The facts, as stated in the court's special finding, were substantially as follows: July 20, 1899, the appellant was the owner in fee simple and in possession of a certain tract of land in Laporte county, Indiana, and the legal title thereof was still in him at the date of the court's finding. At the date first above mentioned the appellant entered into a written contract with the appellee for the sale of this land. By the terms of the contract, which was signed by both parties, and dated July 20, 1899, the appellant agreed to sell to the appellee the land in question, described, for the sum of \$2,300, "of which I have received this day \$10, and agree to take \$490 in thirty days, \$500 in six months, at which time I will give a warranty deed conveying a perfect title free of any encumbrance, and take a mortgage on said land, payable in payments of \$500 per year, with interest at six per cent, except one, the last note or payment to be \$300. It is agreed that said notes shall be drawn payable on or before the date of ultimate maturity, and it is also agreed that payments can be made on the two specified payments first named herein, at ar-

time previously, and the deed shall be made when the first \$1,000 payment named is made. And the said Early hereby agrees to make the named payments as specified." August 25, 1899, the appellee paid the appellant under the contract \$490, the latter accepting the same, and receipting to the former therefor. July 24, 1900, the appellee paid the appellant upon the contract \$15.77, which the appellant accepted, receipting to the appellee therefor. July 24, 1900, the appellant caused a letter to be written to the appellee, which the latter received about the same date, advising the appellee that the time was past due for making the second payment of \$500, which, by the terms of the contract, was to be made in six months from the ⁴³⁶ date of the contract, and which, therefore, was due January 20, 1900, and informing the appellee that the appellant wanted to know soon what he was going to do about it; to which letter the appellee replied, July 31, 1900, saying he would see the appellant before long, and would settle matters with him for the land. At the time of the making of the contract the appellee was a man of business experience, and was engaged in the real estate business, which he had been following for more than thirty years; and the appellant was a German, unable to read or write in either the German or the English language, and could talk the English language only brokenly, and understood it with difficulty. He had lived in the neighborhood of the land in question for thirty-one years. At the time of the making of the contract, the appellee went to the home of the appellant, and prepared the contract himself, and it was there signed by the appellee, and was signed in the name of the appellant, in his presence, and with his consent, by the appellant's son; and at the same time the appellant informed the appellee that the former was selling the land because he was in debt, and wanted to use the money he would derive from the sale for the purpose of paying his debts; and, in fact, the appellant was in debt to the amount of about \$1,300, and he used the \$500 paid him as aforesaid by the appellee to pay a part of said indebtedness immediately upon the payment of the same to him.

On or about August 30, 1900, the appellant with one Henry Jahns, a neighbor, who acted as an interpreter for the appellant, called upon the appellee in the city of Laporte, and demanded of the appellee that he pay the \$500 then past due; and the appellee then informed the appellant that the former had no
; and could not get any then, and could not make the pay-
The appellant informed the appellee that the former

needed the money to pay his debts, and the appellee then stated to the appellant that the former expected to sell a piece of land in a short ⁴³⁷ time, from which he would get his money to make the payment, and that he would make the payment soon; and the appellant then informed the appellee that unless he made the payment by Christmas, he could not have the land, and that the appellant would sell it to some one else. On or about October 1, 1900, Herman Boldt, a son of the appellant, at the latter's request, again called upon the appellee in the city of Laporte, and inquired of him if he had as yet arranged to make the payment, to which the appellee replied that he could not pay then; that he had not yet been able to raise the money, but he would do so soon; in response to which Herman Boldt informed the appellee that unless he made the payment by Christmas, he could not have the land, but the appellant would sell it to some one else. The appellee did not make any further payment before Christmas, 1900, and did not go to the appellant and give him any further information, or make any other arrangement with him whatever; but February 9, 1901, he left the state of Indiana, and did not return until July 4, 1901. July 5, 1901, the appellant entered into a written contract with one Charles H. Tuesburg, by which the appellant promised and agreed to sell and convey the land in question for the price of \$4,000, of which Tuesburg at the time paid the appellant \$200, which the appellant used and applied to the payment of his debts; but the appellant at the date of the court's finding had not executed to Tuesburg any deed of conveyance for the land.

At the time of the making of the contract of the appellant and the appellee the land in question was marsh land, uncultivated and unimproved, and there was a growing demand for such lands in that neighborhood, and such lands were increasing in value, of which fact the appellee had knowledge, and the appellant also knew that the land in controversy was increasing in value, and he fully understood the value of the land, and understood the contract between him and the appellee and all its provisions; and ⁴³⁸ when the appellant and Jahns called on the appellee, August 30, 1900, the appellant had learned and knew that the lands in the neighborhood in question were increasing in value. From the early spring of 1899 to August 30, 1901, the land in question had gradually increased in value, about twenty-five to forty per cent. July 11, 1901, the appellee learned that the appellant had entered into a contract for the sale of the land to Tuesburg, and the appellant on that day in-

formed the appellee that the former had sold the land to Tiesburg. Thereafter, on August 30, 1901, the appellee called upon the appellant at his home and offered him, first, \$660, and presented three notes dated August 30, 1901, signed by the appellee, and payable to the appellant, two of them for \$500 each and one for \$300, due on or before one, two and three years from date, respectively, with interest at the rate of six per cent from date until paid, and a mortgage on the land in question securing the notes, signed and acknowledged by the appellee, and demanded of the appellant that he execute to the appellee a deed for the land. Immediately thereafter, on the same occasion, the appellee offered the appellant \$1,160 and two notes, signed by the appellee, and payable to the order of the appellant, dated August 30, 1901—one for \$500, due on or before one year after date, and the other for \$300, due on or before two years after date—and also offered a mortgage on the land to secure the notes, executed and acknowledged by the appellee; in response to which the appellant stated to the appellee that he had sold the land. At the time for the payment of \$500 and the delivery of the deed, January 20, 1900, neither party did anything toward the performance of the contract. August 31, 1901, the appellee brought this suit in the Laporte circuit court, and filed in the office of the clerk of that court a *lis pendens* notice of the bringing of the suit. The appellee did not at any time after the making of the contract in suit until August 30, 1901, offer to ⁴³⁹ pay the \$500 which came due January 20, 1900, nor did he during that period execute or offer to execute notes and mortgage for the deferred payments. At all times from the date of the contract up to Christmas of the year 1900, the appellant was ready, willing and able to accept and receive the payments and notes and mortgage and execute and deliver to the appellee a warranty deed conveying title to the land in accordance with the contract. He never executed or tendered to the appellee a deed of conveyance for the land. August 11, 1900, the appellant authorized the appellee to cut the grass on the land, which he had done. April 12, 1901, the appellee paid to the treasurer of Laporte county \$11.52 for the taxes assessed against the land for the year 1900. The court found that about the end of August, 1900, the appellant agreed with the appellee to an extension of the time for making payment upon the contract until Christmas, 1900. August 30, 1901, the appellee went to the appellant prepared to pay the money then due from the former on the latter upon the contract, and prepared to execute the

notes and mortgage for the balance of the purchase money for the land, and prepared to tender said money and said notes and mortgage, but was informed by the appellant that he could not have the land, and that the appellant refused to carry out the terms of the contract with the appellee.

Upon these facts the court stated conclusions of law as follows: "1. That the plaintiff is entitled to a specific performance of said contract by the defendant; 2. That the defendant shall execute and deliver to the plaintiff a good and sufficient warranty deed for said real estate, and should receive therefor from the plaintiff the amount of money, notes and mortgage tendered to him August 30, 1901, or the full amount of the balance of the purchase price which was due August 30, 1901, in cash, at the option of the plaintiff, as provided in said contract; and that if the defendant fails within a reasonable time to ⁴⁴⁰ execute and deliver said deed and receive said consideration therefor, a commissioner should be appointed by the court to execute such deed, on the payment of such consideration into the hands of the clerk of this court for the use of the defendant."

By the terms of the contract the appellant after receiving, at its date, the payment of \$10, and after receiving in thirty days thereafter \$490, was to receive in six months after the date of the contract—that is, on January 20, 1900—another payment of \$500. He was then to execute the deed of conveyance, and to take a mortgage on the land to secure payment of the remainder of the purchase money, payable in three installments, represented by three notes bearing interest at six per cent—two for \$500 each, to mature ultimately one in one year and the other in two years from January 20, 1900, and one for \$300, to mature ultimately in three years from that date; but these notes were to be drawn payable on or before such dates of ultimate maturity. The appellee agreed to make the payments as thus specified. There was also a provision that payments might be made on the installment of \$490 due in thirty days and the installment of \$500 due in six months at any time before their maturity, and in this connection it was provided that the deed should be made when the first \$1,000 of the purchase money was paid. When the appellee offered to make payments and to give notes and mortgages on August 30, 1901, the installment of \$500 payable January 20, 1900, had been due one year and seven and one-third months, and the time of this offer was more than seven months after the date designated for the ultimate maturity of the first note for \$500 contemplated by the contract.

The court rendered its special finding and its judgment September 8, 1902. At that date, if the contract had been carried out according to its terms, all the installments of the purchase money would have been due except the final installment ⁴⁴¹ of \$300, which would have ultimately matured in less than five months thereafter. In any view of the case, the appellant could not have been regarded as having been placed in a position where he could be required to make the deed before August 30, 1901. The court concluded, September 8, 1902, that he should execute the deed, and should receive therefor the amount of money, notes and mortgage tendered to him, August 30, 1901, or the full amount of the balance of the purchase price due at that date in cash, at the option of the appellee.

It will have been observed that the court found that two offers of money, notes and mortgages were made by the appellee on that day; but we notice that the judgment provided that the appellant should execute the deed and receive from the appellee \$1,160, "being payments and interest due on August 30, 1901, together with his promissory notes for \$800, secured by mortgage on the said land for the balance of the purchase money, or that he receive from the plaintiff, at the option of the plaintiff, \$1,960 in cash, being the total amount due from plaintiff to defendant for said real estate on August 30, 1901." In stating in the finding of facts the offer of August 30, 1901, which included the proposition to pay \$1,160, it is stated that the appellee offered the appellant two notes dated August 30, 1901—one for \$500, due on or before one year after date, and one for \$300, due on or before two years after date. The maturity of each of these notes would be seven months later than the ultimate maturity provided for in the contract. The notes, by the terms of the contract, were to draw interest at six per cent. It does not appear from the finding of facts that the notes offered along with the \$1,160 in cash provided for any interest, and in the conclusions of law and the judgment it was not required that the notes to be given by the appellee should provide for any interest.

It is well settled that the enforcement of specific performance of contracts rests in the sound discretion of the court, ⁴⁴² and the court will do what seems just and equitable under the peculiar circumstances of the particular case before it for decision. The awarding of specific performance by a court of equity is a matter, not of absolute right but of sound discretion; and a bill may be resisted on much weaker grounds than are necessary for its maintenance: *Vawter v. Bacon*, 89 Ind. 565.

In a suit for specific performance the plaintiff must show that he has been ready, willing and eager to perform, and the burden is upon him to show a full and complete performance or offer to perform on his part: *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97.

Though time be not of the essence of the contract originally, it may be so rendered by the conduct of the vendor or vendee subsequent to the making of the contract: *Jackson v. Ligon*, 3 Leigh (Va.), 161, 188.

If, succeeding the fault of the vendee by failure to pay an installment of the purchase money at the time stipulated in the contract, there has been a considerable increase in the value of the property, this may be a sufficient reason for denying him specific relief; for the contract would thereby become an unequal one, and its specific enforcement would encourage delays by enabling the vendee to take advantage of changes in his favor, though he might have delayed intentionally, having purchased for speculation, and not meaning to perform unless favorable changes occur: *Smith v. Lawrence*, 15 Mich. 499. See, also, *Mahon v. Leech*, 11 N. Dak. 181, 90 N. W. 807.

In *Brashier v. Gratz*, 6 Wheat. 528, 5 L. ed. 322, it was said by Mr. Chief Justice Marshall: "Another circumstance which ought to have great weight is the change in the value of the land. It was purchased at \$22.50 per acre. Mr. Brashier [the plaintiff] failed to comply, and was unable to comply with his engagements. More than five years after the last payment had become due the land suddenly rises to the price of \$80 per acre. Then he ⁴⁴³ tenders the purchase money, and demands a specific performance. Had the land fallen in value, he could not have paid the purchase money [he being insolvent]. This total want of reciprocity gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article."

Lapse of time after maturity, before payment of purchase money, may generally be compensated by interest; and time will not be regarded as of the essence of such a contract as the one in suit merely because definite dates of performance are designated therein: *Jackson v. Ligon*, 3 Leigh (Va.), 161, 188; *Fry on Specific Performance*, 3d Eng. ed., sec. 1077. Neither can inability to pay the purchase money when due, not attributable to the fault of the vendor, be regarded by the court as any excuse for failure to pay at maturity, or upon demand thereafter.

In *Ewing v. Crouse*, 6 Ind. 312, where the provisions of

the contract seemed to show that the parties at the time of the sale contemplated a literal performance within the period named, it was said that, if this view were incorrect, yet the subsequent conduct of the parties afforded sufficient proof that they regarded and expressly treated the time agreed on for the payment of an installment of purchase money as an essential element in the contract.

The appellant was in debt when the contract was made, and he then informed the appellee that he was selling the land to pay his debts, and he applied upon his debts the moneys he received, which were not enough to discharge his indebtedness. The value of the land was rising gradually when the contract was made, as they both knew, and it had risen greatly afterward. When payment, overdue, was demanded, the appellee was told that the money was needed to pay debts, which was the purpose of the sale, as he was apprised from the beginning. He was an experienced business man and dealer in real estate, and, while the land was rising greatly in value, he gave no reason for ⁴⁴⁴ failure to pay except his alleged inability to do so. He had himself gone to the appellant for the making of the contract, the appellant being a man who imperfectly understood the English language, and who was desirous of freeing himself from debt. Having wholly neglected to comply with the demand or payment during the time limited by the notice, he continued thereafter to be in default, and made no offer until after he learned that the appellee had contracted to sell to another person. While we need not treat the extraneous matters which we thus far have recounted as being sufficient of themselves alone to make time of the essence of the contract, they are not unworthy of the observation of a court of equity in considering the notice limiting the time of payment to Christmas, 1900, and the conduct of the parties thereafter.

In Pomeroy on Contracts, second edition, section 395 it is said: "As the doctrine that time is not essential in the performance of a contract may sometimes work injustice, and be used as the excuse for unwarrantable laches, the following rule was introduced at a comparatively late period, and is now firmly settled, which prevents the doctrine from being abused by the neglect or willfulness of either party. If either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of the agreement on his side, the other party notice, fix upon and assign a reasonable time for completing a contract, and may call upon the defaulting party to

do the acts to be done by him, or any particular act within this period. The time thus allotted then becomes essential, and if the party in default fails to perform before it has elapsed, the court will not aid him in enforcing the contract, but will leave him to his legal remedy." It is further said in section 396: "The notice cannot be an arbitrary and sudden termination of the transaction; it cannot put an immediate end to a pending dispute or negotiation as to the title; it must allow a reasonable length of time for the other party to perform, ⁴⁴⁵ and if it fails in any of these respects, it may be disregarded, and will produce no effect upon the equitable remedial rights of the party to whom it is given. The nature and object of the contract, the circumstances of the case, and the previous conduct of the parties, are important, and, indeed, controlling elements in determining the reasonableness of the notice. The notice, also, to be effectual in making the time allotted an essential element of the performance, must be express, clear, distinct and unequivocal": See, also, to the same effect, Fry on Specific Performance, 3d Eng. ed., sec. 1092 et seq. This rule appears, as stated by these text-writers, to be well and firmly established in England and America.

In *Taylor v. Brown*, 2 Beav. 180, it was held that, while it was established by repeated decisions that where the contract and the circumstance were such that time was not considered as of the essence of the contract, if any unnecessary delay was created by one party, the other had the right to limit a reasonable time within which the contract should be perfected by the other, and that in cases where the time was fairly limited by notice, stating that within such a period what was required must be done, or the contract would be treated as at an end, bills for specific performance afterward filed had been dismissed by the court with costs; yet this rule was not applicable to a case of notice given during the pendency of negotiations, stating that from the time and on the day of the giving of the notice the party giving it would consider the contract at an end.

In *Benson v. Lamb*, 9 Beav. 502, where there was a delay of two months after the date designated for the completion of the contract, a notice of ten days then given was held sufficient to put an end to the contract, and specific performance was denied.

In *Wiswall v. McGowan*, 1 Hoff. Ch. 125, 138, it was said that either party to a contract for the sale of land, ⁴⁴⁶ where no time has been fixed or performance at the appointed time has been waived, may limit a day at which it must be fulfilled; but

this must be a reasonable period according to the nature of the contract, affording the party a reasonable time to make his preparation, and of this period due notice must be given: See, also, *Thompson v. Dulles*, 5 Rich. Eq. 370; *Mudgett v. Clay*, 5 Wash. 103, 111, 31 Pac. 424; *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 South. 756. And see *Rummington v. Kelley*, 7 Ohio 432, where there was long delay after the vendor informed the vendee of the immediate end of the contract and tendered him his notes. Specific performance was denied. We need not go so far in the case before us.

In *Hatch v. Cobb*, 4 Johns. Ch. 559—a suit of the vendee for specific performance—it appeared that the plaintiff had made default in the payments, which by the contract, were made a condition precedent to the conveyance, and the defendant had accepted one small payment subsequent to such default, but about six months thereafter the defendant repeatedly called for payment, and gave notice that if the plaintiff did not pay him he should be obliged to part with his interest in the land. No payment being made, the defendant assigned over his right to a third person, and the plaintiff, with knowledge of that fact, made a tender of the balance due on the contract, and filed his bill for specific performance, etc. The court, in holding that specific performance could not be decreed, said that the defendant was not bound to wait any longer upon the plaintiff, but had a clear right to exact immediate payment, or else to part with his interest in the land to another, in order to meet his own convenience or necessities. It was further said that, if the defendant had not parted with his interest before the filing of the bill, it might even have been a point deserving consideration whether the plaintiff was entitled to assistance when no accident, mistake or fraud had intervened to prevent the performance of the contract on his ⁴⁴⁷ part, and when, after indulgence and after considerable subsequent delay, he had twice been requested to make payment and had omitted to do it.

Where the time of performance specified in the notice to the defaulting party is expressly assented to by the latter, the reasonableness of the notice cannot be questioned by him: *Miller v. Rice*, 133 Ill. 315, 330, 24 N. E. 543.

In *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 15 South. 756, it was said: "Although the complainant was in default, he made no reply whatever to the notice. If he had refused still further extension of time he should have let his refusal be known. If he considered that he had further rights

in the matter, and that the Winter Park Company could not put a limitation of time upon him, he should have been prompt in the assertion of such rights. Failing to ask any further extension or to assert any right, he must be held as acquiescing in the demand contained in the notice, and as abandoning all rights he might have had to enforce the performance of the contract." In that case, the time fixed in the notice for the performance of the contract was nearly forty days, and the act to be done was the payment of a sum of money. This was held to be a reasonable limitation, though one party lived in Massachusetts and the other was in Florida.

At all times from the making of the contract up to the date specified in his notice as the limit of time for payment, the appellant was ready, willing and able to receive and accept payment and notes and mortgage, and to execute to the appellee a deed of conveyance as stipulated in the contract. Being always met with the statement of inability of the appellee to pay, no occasion arose for express tender or offer of a deed of conveyance. Upon all the facts, we think the appellee is not entitled to the interposition of a court of equity, but should be remitted to his remedy at law.

⁴⁴³ The appellee has filed a cross-assignment of error in the overruling of his demurrer to certain paragraphs of answer, but, if the conclusion to which we have thus arrived be correct, there was no error in the ruling.

The judgment is reversed and the cause is remanded, with instruction to state a conclusion of law in accord with the foregoing opinion.

WHEN TIME IS, OR MAY BECOME, OF THE ESSENCE OF CONTRACTS FOR THE SALE OF LAND.

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I. At Law, time is of the essence of a contract to convey land, and if the vendor or the vendee is not able to perform on the day set for performance, either may consider the contract at an end. In other words, at law, time is of the essence of the contract; and strict performance is generally required: *Conway v. Case*, 22 Ill. 127; *Cromwell v. Wilkinson*, 18 Ind. 365; *Hill v. School District*, 17 Me. 316; *Hill v. Fisher*, 34 Me. 143; *Schmidt v. Reed*, 132 N. Y. 109, 30 N. E. 373. If a vendor of land sues the vendee at law for the recovery of damages for an alleged breach by the vendee of an executory contract of purchase, time, in such case, is of the essence of the contract, and the vendor, in order to recover, must show himself to have been ready, able, and willing to convey by good and perfect title, promptly at the stipulated time: *Frazier v. Boggs*, 37 Fla. 307, 20 South. 245.

II. In Equity—General Rule.

As a general rule, time is not deemed to be of the essence of a contract to convey land, unless the parties have expressly so stipulated or have so treated it, or it necessarily follows from the nature and circumstances of the contract or the conduct of the parties. Equity holds time to be, *prima facie*, nonessential, and will enforce the specific performance of agreements to convey land after the time for their performance has been suffered to pass by the party asking for the intervention of the court.

While the above is the generally recognized rule, there are a number of cases which hold, without limitation, that in equity time is not regarded as of the essence of the contract unless expressly stated therein to be so: *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 193, 15 South. 756; *Knott v. Stephens*, 5 Or. 235; *Bryson v. Peak*, 8 Ired. Eq. 310; *Martindale v. Waas*, 3 McCrary, 108, 8 Fed. 854. In contracts for the sale of real estate time of performance of their stipulations is not in general, in equity, of the essence of the contract producing loss of or forfeiture of rights: *Jarvis v. Cowger*, 41 W. Va. 268, 23 S. E. 522. Even under the rule thus strictly stated, namely, that equity does not regard time as the essence of a contract to convey land unless expressly made so by the parties, it requires that one who seeks specific performance of such a contract shall not be guilty of unreasonable delay, and must seek his redress with reasonable promptness: *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 South. 756. Of course, it must be conceded that time is not essential to such contract when the situation of the parties is unchanged, and the delay is reasonably excused, and in default manifests good faith, and is reasonably prompt: *Austin v. Wacks*, 30 Minn. 335, 15 N. W. 409. Time is not essential in equity in general, where circumstances of a material nature have prevented a party from strict compliance: *Garretson v. Vanloon*, 3 G. Greene, 128, 54 Am.

The general rule, however, sustained by a multitude of authorities as first stated, that time is not of the essence of a contract to convey land unless made so by its terms expressly, or by implication from the nature of the subject matter, the object of the contract, or the situation or conduct of the parties: *Durant v. Comegys*, 3 Idaho, 204, 28 Pac. 425; *Brumfield v. Palmer*, 7 Blackf. 227; *Ewing v. Crouse*, 6 Ind. 312; *Keller v. Fisher*, 7 Ind. 718; *Jones v. Robbins*, 29 Me. 351, 1 Am. Rep. 593; *Austin v. Wacks*, 30 Minn. 335, 15 N. W. 409; *Walton v. Wilson*, 30 Miss. 576; *Fletcher v. Wilson*, *Smedes & M.* Ch. 376; *Huffman v. Hummer*, 17 N. J. Eq. 263; *Grigg v. Landis*, 19 N. J. Eq. 350; *Cranwell v. Clinton Realty Co.* (N. J. Eq.), 58 Atl. 1030; *Pickering v. Pickering*, 38 N. H. 400; *White v. Butcher*, 6 Jones Eq. 233; *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239; *Wright-Blodgett Co. v. Astoria Co.* (Or.), 77 Pac. 599; *D'Arras v. Keyser*, 26 Pa. St. 249; *Johnson v. McMullin*, 3 Wyo. 237, 21 Pac. 701. Though time may be made of the essence of a contract for the sale of land by express agreement or reasonable construction, yet in the absence of express stipulation, courts ordinarily lean against such construction, for the reason that it would result in the enforcement of a penalty, and because interest is ordinarily treated as full compensation for the delay: *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352; *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239. In equity, time is not necessarily deemed of the essence of the contract, but it may be so made by express stipulation, and then unless peculiar circumstances have intervened, it must be considered and treated as of the essence: *Morgan v. Herrick*, 21 Ill. 481; and even in equity, time will be regarded as of the essence of the contract, when it clearly and affirmatively appears that the parties intended that time should be essential: *Jewett v. Black*, 60 Neb. 173, 82 N. W. 375.

III. Time may be Made of Essence by Agreement.

Undoubtedly all persons have the right to make their own contracts, and by express stipulation may make the time of performance material and of the essence of the contract, so that a failure to perform at the time avoids the agreement: *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310, 4 Pac. 629; *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280; or the one party to the contract may, upon default of the other in such case, sue for a specific performance of the contract: *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Burke v. Bourne*, 98 Cal. 171, 32 Pac. 980. Time is, however, of the essence of the contract when the sureties, by expressly fixing upon a time for its performance, have indicated that time was regarded by them as important or essential: *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352; *Kemp v. Humphreys*, 13 Ill. 573; *Garretson v. Vanloon*, 3 G. Greene, 128, 54 Am. Dec. 492; *Tyler v. McCardle*, 9 *Smedes & M.* 230; *Hicks v. Aylsworth*, 13 B. I. 562. The intention of parties as regards the time of performance will be secured in equity as at law, and when time appears by stipulation to be a distinct or essential feature in

the contract, it must be considered material: *Garretson v. Vanloon*, 3 G. Greene, 128, 54 Am. Dec. 492; *Grigg v. Landis*, 19 N. J. Eq. 350. And if the parties, by clear and explicit terms, provide that time shall be of the essence of the contract, nothing short of an act of God will excuse a failure to perform: *Miller v. Phillips*, 31 Pa. St. 218.

IV. Time, When of Essence.

a. *Generally.*—The question as to when time is of the essence of the contract generally arises when a bill is filed for the specific performance of a contract for the sale of lands, as in the principal case, and time is of the essence of such a contract either when, from the nature, or the subject matter of the contract, it is material that it should be performed at a certain time, or when the contract, by express stipulation, makes it of the essence, and releases the other party upon failure to comply within the time. In other words, time may be made of the essence of the contract by express stipulation of the parties, or without such express stipulation, by the nature of the contract itself or of the circumstances under which it was made, as where the benefit to accrue from the consideration to be paid or the conveyance to be executed materially depends upon a strict performance in point of time: *Sneed v. Wiggin*, 3 Ga. 100; *Garretson v. Vanloon*, 3 G. Greene, 128, 54 Am. Dec. 492; *Goldsmith v. Guild*, 10 Allen, 239; *Grigg v. Landis*, 19 N. J. Eq. 350; *Pickering v. Pickering*, 38 N. H. 400; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Myers v. League*, 62 Fed. 654; *Waterman v. Banks*, 144 U. S. 395, 12 Sup. Ct. Rep. 646, 36 L. ed. 479. Time may be of the essence of a contract for the sale of land, even without an express provision to that effect, when such is the evident intent of the parties, and such intention may be inferred from the nature of the property itself and the situation and relation of the parties thereto: *Edwards v. Atkinson*, 14 Tex. 373; *Kentucky Distilleries etc. Co. v. Warwick Co.*, 109 Fed. 280.

b. *Fluctuation in Value.*—The principle that time, even in equity, may become of the essence of the contract for the sale of property without express stipulation to that effect from the very nature of the property itself, is peculiarly applicable to mineral properties, which undergo sudden, frequent, and great fluctuations in value, and require the persons interested in them to be vigilant and active in asserting their rights: *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. Rep. 646, 36 L. ed. 479; *Durant v. Comegys*, 3 Idaho, 204, 28 Pac. 425. Hence time is of the essence of an option of executory contract to purchase mining property without express agreement to that effect, and when a vendor gives an option to purchase his mining property by the payment of the purchase price in installments at certain dates, he is not required, on declaring a forfeiture for failure to pay the price as required, to return installments paid: *Merk v. Bowery in. Co. (Mont.)*, 78 Pac. 519. To the same effect, *Durant v. Comegys*, Idaho, 204, 28 Pac. 425. If the property is fluctuating in value at

the time that a contract for its sale is made, a provision therein that payment therefor is to be made on or before a certain day, must be construed as making time of the essence of the contract, and the vendor cannot be compelled to specifically perform if the purchase money is not paid on the day appointed: *Kentucky Distilleries and Warehouse Co. v. Warwick Co.*, 109 Fed. 280. If the conduct of the parties shows that the vendors regarded the time limited in the contract of sale for the payment of the purchase price as an essential element, and this was recognized by the purchaser, and that the value of the lands in the market was rising rapidly, and all of the parties were dealing with the lands as a commercial speculation, it must be implied that time was of the essence of the contract, and the parties are estopped from denying that they agreed that the contract was ended: *Myers v. League*, 62 Fed. 654. There may be cases, however, when time is not stipulated to be essential, and when the situation of the parties is unchanged, and the delay reasonably excused, and the vendee manifests good faith, and is reasonably prompt and vigilant, in which the court may, in the exercise of a sound discretion, though the land has risen in value, relieve him from the consequences of the delay: *Austin v. Wacks*, 30 Minn. 336, 15 N. W. 409. Thus an enhancement in the price of the land, after the date of the contract, does not make time of the essence when it appears to have risen from the making of a number of purchases by the vendee, and not from a general demand for the property, and no material rise has occurred during the period of the vendee's delay: *Sylvester v. Born*, 132 Pa. St. 467, 19 Atl. 337. Though time is not generally regarded in equity as of the essence of the contract, yet if the delay is considerable, and is unaccounted for, and where it diminishes the value of the property, it becomes essential and material: *Bellas v. Hays*, 5 Serg. & R. 427, 9 Am. Dec. 385. Where time becomes of the essence of the contract because of fluctuations in the value of the property, the party having the option to insist upon strict performance must act promptly before other equities intervene: *Grigg v. Landis*, 21 N. J. Eq. 494. If property is purchased with a view of expending large sums of money in its improvement, and it is agreed between the parties that the title to the property shall be perfected by a particular day, time becomes of the essence of the contract, and the vendor, having failed to perfect the title by the time agreed upon, will not be allowed further time for that purpose: *Gilman v. Smith*, 71 Md. 171, 17 Atl. 1035. When payment of the purchase money for land is to be made in depreciated currency, which at the time of the maturity of the debt is rapidly depreciating in value, time becomes of the essence of the contract: *Campbell v. Ranson*, 21 Gratt. 405; *Booten v. Scheffer*, 21 Gratt. 474.

c. *Payment in Installments.*—From the nature of the transaction time becomes the essence of a contract for the sale of land which provides that the consideration is to be paid in installments at certain

times, that a good and sufficient deed is to be delivered upon receiving the payments at the time and manner agreed upon, and that upon a failure to comply with the terms of the contract by the vendee, the vendor is to be released from all obligations to convey the property, and the vendee is to forfeit all rights thereto: *Woodruff v. Semi-Tropic Land and Water Co.*, 87 Cal. 275, 25 Pac. 354. Under a contract for the sale of land providing for the payment of the purchase money in installments, to be paid on specified dates, and for the execution of a deed upon the payment of the last installment, time becomes of the essence of the contract, and if such contract provides for a forfeiture of all moneys paid upon default by the purchaser, and that the vendor shall thereupon be released from all obligation to convey, the vendor is not in default until his refusal to convey upon a tender of the last installment of the purchase money, but is entitled, upon tendering a deed, to demand payment of the purchase money, even after the last installment is due: *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429; *Ewing v. Crouse*, 6 Ind. 312. If, in a contract to sell timber lands, it is stipulated that the purchase money shall be paid in installments at certain dates from the proceeds of timber cut from the land, the vendor to convey in fee when full payment is thus made, it must be assumed that the parties intended that the payments were to be kept up in the ratio of the cutting, that the vendor reserves the right of re-entry in case of failure to pay, and that time must be regarded as of the essence of the contract: *Jennisons v. Leonard*, 21 Wall. 302, 22 L. ed. 539. If it is expressly stipulated that the installments shall be paid at specified times, and that if any one installment is not met promptly, the whole sum shall be due and payable, time becomes of the essence of the contract, and if the party agreeing to pay fails to do so, he is not entitled to relief in equity: *Sneed v. Wiggins*, 3 Ga. 94. If the agreement for the sale of the property provides that if the party agreeing to pay the purchase money in installments at specified dates shall become in arrears, the contract shall become null and void, and such party shall forfeit all amounts paid by him and relinquish all claims against the other party, time becomes of the essence of the contract, and a failure to pay one of the installments works a forfeiture of the agreement and of previous payments: *Merk v. Bowery Mining Co. (Mont.)*, 78 Pac. 519; *Axford v. Thomas*, 160 Pa. St. 8, 28 Atl. 443. It has been held, however, that although the contract provides for the payment of the purchase money in installments at specified times, and when paid the vendee is to receive a deed for the property, time is not of the essence of the contract, so as to entitle the vendor to refuse to perform and execute the deed on the ground that a small part of the last installment of the purchase price remained overdue and unpaid: *Maris v. Masters*, 31 Ind. App. 235, 67 N. E. 699.

d. Time Fixed for Payment.

1. **When Deemed Essential.**—It may be stated as the general and better rule, although there is some conflict of authority, that if a contract for the conveyance of land or other property provides that the purchaser shall pay, or complete the payment of the purchase price, at a certain date, and that if the money is not then paid, the contract shall become null and void, the time of payment is of the essence of the contract, and strict fulfillment, unless waived, or the time extended, is requisite to give a right to compel specific performance of the contract: *Kimball v. Tooke*, 70 Ill. 553; *Fullerton v. McLaughlin*, 70 Hun, 568, 24 N. Y. Supp. 280; *Baumann v. Pinkney*, 14 Daly, 241; *Patchin v. Lamborn*, 31 Pa. St. 314; *Johnson v. Portwood*, 89 Tex. 235, 34 S. W. 596, 787; *Coughran v. Bigelow*, 9 Utah, 260, 34 Pac. 51. Time is of the essence of a contract for the sale of land when it declares that the vendor shall convey at any time within sixty days from the date of the contract, on the payment of the balance of the purchase price, and that such price shall be paid within such time; otherwise, the contract shall be null and void. Tender of the balance of the purchase price after the time designated will not entitle the vendee to specific performance: *Martin v. Morgan*, 87 Cal. 203, 22 Am. St. Rep. 240, and note 243, 25 Pac. 350. Under a contract for the sale of real estate, providing that deeds of the property were to be delivered to the vendee for his inspection within six months thereafter, and the purchase money paid at the time of the delivery of such deeds, and their acceptance by the vendee, time is of the essence of the contract, and it must be performed by both parties within the six months: *Latrobe v. Winans*, 89 Md. 636, 43 Atl. 829. Where a contract to sell an interest in a mining claim was upon condition that the buyers should pay a certain sum on or before a specified date, and also pay for or do an equal share according to their interest of all work or improvements put on the claim before that time, the contract is merely an option to purchase, so that the payment of the stipulated sum at the time specified is of the essence of the contract; and a failure to make the payment within the time forfeits all rights under the contract: *McKenzie v. Murphy*, 31 Colo. 274, 72 Pac. 1075.

2. **When not Deemed Essential.**—On the other hand, some cases hold that it will not be presumed that time was intended to be of the essence of the contract from the mere fixing of a day for the delivery of the deed or the payment of the purchase money: *Smith v. Proffitt*, 82 Va. 832, 1 S. E. 67. It has also been held that if time is not expressly made of the essence of a contract for the sale of real estate, a failure to pay the purchase money by the time fixed therein is not a cause for forfeiture: *Presser v. Hildenbrand*, 23 Iowa, 483. Many cases, following the general rule that time is not in equity of the essence of a contract to convey land or for the sale thereof, except by express stipulation of the parties, or unless it necessarily

follows from the nature and circumstances of the contract, hold that time is not made the essence of such a contract by a clause giving the vendor the election to consider the contract at an end in the event of the nonpayment of the purchase money at the time limited or specified, unless it is clearly shown that the vendor has elected to treat the time of payment as of the essence of the contract. Of such cases are *Steele v. Branch*, 40 Cal. 3; *Young v. Daniels*, 2 Iowa, 126, 63 Am. Dec. 477; *Brink v. Morten*, 2 Iowa, 411; *Sanford v. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748, 16 Pac. 465; *Munro v. Edwards*, 86 Mich. 91, 48 N. W. 689; *Jones v. Loggins*, 37 Miss. 546; *Benson v. Tilton*, 24 How. Pr. 494; *Sylvester v. Born*, 132 Pa. St. 467, 19 Atl. 357. Thus, it has been held that time is not of the essence of a contract for the sale of land, in the absence of an express agreement, and the contract is not forfeited by nonpayment of the purchase money on the day it becomes due, but specific performance may be enforced where it does not appear either that the land was improved, yielding a yearly rent, or that it is liable to fluctuation in value, or has actually changed in value, or that between the sale and offer to pay there has been any change affecting the rights, interests or obligations of the parties, or that the vendee, by his acquiescence or otherwise, has treated the contract as at an end: *Young v. Daniels*, 2 Iowa, 126, 63 Am. Dec. 477. It has also been held that where the parties to the contract have not expressly stipulated that performance at a particular time shall be of the essence of the contract, and where from the nature and circumstances of the contract and the situation of the parties there would be no particular hardship upon the party against whom the contract is sought to be enforced, a court of equity, so far as the performance of the contract at the time stipulated for is concerned, will aid the party in default in making payment of the purchase money: *Munro v. Edwards*, 86 Mich. 91, 48 N. W. 689. It is maintained in *Sanford v. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748, 16 Pac. 465, that time is not of the essence of a contract for the sale of lands when such contract is simply an agreement to convey upon the payment of a certain amount at a specified time, and a conveyance of the title may be decreed upon the tender of the price, and interest within a reasonable time. When time is not expressly as of the essence, courts are reluctant to enforce forfeitures.

It has also been maintained that when time is not of the essence of the contract, either expressly or from the very nature of the subject, equity will specifically enforce an agreement to sell land, although the vendee has not tendered the purchase money within the time limited therefor, unless there has been gross laches on his part, or a change of circumstances rendering such enforcement inequitable: *Sylvester v. Born*, 132 Pa. St. 467, 19 Atl. 337. It has also been held that a condition in the contract that if the vendee complies promptly the vendor will execute a deed, does not make time of the essence

of the contract, and a failure by the vendee to pay the purchase money when it falls due will not authorize the vendor to rescind without an offer to perform on his part: *Jones v. Loggins*, 37 *Miss.* 546; *Coles v. Shepard*, 30 *Minn.* 446, 16 *N. W.* 153.

In some cases courts of equity hold that the time of the payment of the purchase money is not of the essence of the contract, no matter what its stipulations may be. Thus, whether or not time is made of the essence of the contract, equity will not so treat it when the parties themselves have not, and when the first intimation from the vendor that he intended to make the time of payment material came subsequently to the time limited, during which delay he recognized the contract as still in force: *Sylvester v. Born*, 132 *Pa. St.* 467, 19 *Atl.* 337. And a decree for specific performance of the contract will be made after the day fixed in the contract for the delivery of the deed and the payment of the purchase money, when the time fixed appears to have been disregarded by the parties as of the essence of the contract: *Benson v. Tilton*, 24 *How. Pr.* 494.

In a contract for the sale of land, the time of payment may be rendered immaterial by the consent or acquiescence of the parties: *Campbell v. Worthington*, 6 *Vt.* 448; but if there has been no waiver of the time within which the contract was to be performed and the money paid, time is generally of the essence of the contract: *Allen v. Cooper*, 22 *Me.* 133. When a provision that time is of the essence of a contract to sell and convey land is used therein with reference to the payment of the purchase money, its object is to protect the vendor against delay, and it has no application when the price is already paid, and nothing remains to be done but to make the conveyance, which may be compelled by the vendee: *Vorwerk v. Nolte*, 87 *Cal.* 236, 25 *Pac.* 412. If the failure of the purchaser to tender the purchase money at the time fixed by the contract is the result of oversight, and not of intentional neglect, and it is not claimed that there was any trifling with the vendor, nor that the vendee intended to vex him, and the situation of the parties and the subject matter of the contract have not changed so that injury will result, the delay of the tender is excusable, and time will be disregarded as material: *Miller v. Cox*, 96 *Cal.* 339, 31 *Pac.* 161. A partial payment of the purchase money after the time fixed for the completion of the sale of the land has passed, and a still later application by the purchaser for indulgence, is sufficient to show that time for the payment of the purchase money was not of the essence of the contract: *Bigham v. Carr*, 21 *Tex.* 142. In *Van Vranken v. Cedar Rapids etc. R. R. Co.*, 55 *Iowa*, 135, 5 *N. W.* 197, 7 *N. W.* 504, it was held that where after default in the payment of the last installment due upon a contract for the sale of land, which made time of its essence, a grant of extension of time of payment upon consideration of the payment of interest at a higher rate makes the provision of the original contract making time of its essence inapplicable to the contract as extended. A contrary result was reached in *Drown v. Ingels*, 3 *Wash.*

425, 28 Pac. 759, where it was maintained that where the vendor extended the time of payment under like facts, he did not waive any of the conditions of the original contract, making time of its essence, and declaring all payments forfeited if full payment was not made by a certain day.

e. **Time to Make Title.**—A provision in a contract for the sale of land that the vendor shall make good title to the land within a certain time, makes the time material, and after the time specified has elapsed, equity will not decree specific performance unless the party seeking it can show that he has made proper exertions to comply with his agreement in time, or unless the other party can be put in as good a situation as if the agreement had been complied with at the time specified: *Rector v. Price*, 1 Mo. 373. In equity, however, in such a case the time of performance ought to be regarded as immaterial where there has been no material change in the circumstances affecting the contract, and where the party complaining has not seriously urged performance: *Haverstick v. Erie Gas Co.*, 29 Pa. St. 254. Likewise if a contract for the sale of land contains a clause providing that the vendor shall furnish the vendee an abstract of title, and that "this contract shall be void if the settlement of this purchase is not had within twenty days from the delivery of the abstract," such provision per se makes time of the essence of the contract requiring the vendor to furnish a proper abstract, and the vendee, within twenty days thereafter, must signify his acceptance or rejection of the title, else he has no right to demand and require specific performance of the contract: *Judd v. Skidmore*, 33 Minn. 140, 22 N. W. 183. If a contract for the sale of land provides that the purchase price shall be paid in cash, the purchaser to have ten days in which to have the title investigated, time is material and the purchase price becomes due on the tenth day, and if the money is not paid by that time the purchaser has no further rights under the contract: *Hollman v. Conlon*, 143 Mo. 369, 45 S. W. 275.

V. Notice to Perform.

The authorities are agreed that, though time is not expressly made of the essence of a contract, it may be made essential by proper action on the part of the party who is not in default and is ready to perform, if the other party is in default without justification. Thus, if the vendee, without proper excuse, fails to pay at the stipulated time, and the vendor is not in default, but is willing and able to perform, he may notify the vendee to pay within a reasonable time or consider the contract forfeited and rescinded, and time then becomes of the essence of the contract. In like manner and with like consequences, the vendee may notify the vendor, if the latter is in default and the former is not: *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 South. 756; *Presser v. Hilderbrand*, 23 Iowa, 483; *Myers v. De Mier*, 52 N. Y. 647; *Schmidt v. Reed*, 132

N. Y. 109, 30 N. E. 373; Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677. Although there is no stipulation in the contract that time shall be essential, nor anything in the nature or circumstances of the agreement, or the conduct of the parties to make it so, it may nevertheless be made so by a tender of performance by one party and demand under reasonable notice to the other to perform: Frink v. Thomas, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239. If a party to a contract for the sale of lands is guilty of laches and negligence in performing, and the time for performance has passed, the other party may, by giving notice, fix a reasonable time for the performance of the contract, and has a right to treat it as abandoned if performance is not completed in such reasonable time.

In order to put a limitation upon the time for the performance of the contract, the time fixed by the notice must be a reasonable time within which to do the act required. What is such reasonable time must depend upon the facts in each particular case: Chabot v. Winter Park Co., 34 Fla. 258, 43 Am. St. Rep. 192, 15 South. 756. Either party to the contract not in default, where no time has been fixed for its performance by express stipulation, or if performance at the appointed time has been waived, may limit a day at which the contract must be fulfilled, but this must be a reasonable period according to the nature of the contract, affording the party a reasonable time to make his preparation, and of this period due notice must be given: Wiswall v. McGowan, 1 Hoff. Ch. 125-138. When the time for the performance of the contract has been, by the consent of the parties, extended indefinitely, either party, by notice to the other, may make time of the essence of the contract and require the other party to perform, or offer to perform, at or before the time mentioned in the notice, that time being reasonable: Darrow v. Cornell, 30 N. Y. App. Div. 115, 51 N. Y. Supp. 828.

VI. Options.

Although an option to purchase land is not, strictly speaking, a contract of sale, because it is an executory unilateral agreement, yet an option is a contract by which the owner of property agrees with another that he shall have the right to buy the property at a fixed price within a certain time designated, and time is always of the essence of such a contract: Fulenwider v. Rowan, 136 Ala. 287, 34 South. 975; Hollmann v. Conlon, 143 Mo. 369, 45 S. W. 275; Merk v. Bowery Min. Co. (Mont.), 78 Pac. 519. In a suit for the specific performance of an option to purchase land, where one party is bound and yet unable to enforce the unilateral contract against the other, who is free, the parties do not stand on an equal footing, and in consequence time must be of the essence of the contract, and when the time given by the option expires without performance on the part of the holder, the right of such holder is ipso facto gone: Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; Glass

v. Rowe, 103 Mo. 513, 15 S. W. 334; *Hollmann v. Conlon*, 143 Mo. 370, 45 S. W. 275.

If, however, when the owner of land gives an option of purchase thereof, and within the time limited for the exercise of such option the purchaser pays a substantial portion of the purchase price, and the owner thereupon agrees, in consideration of such payment, to extend the time for the payment of the balance of the purchase money for a designated period, and further agrees that the purchaser may at any time pay the balance of such purchase money with interest, and that when paid he will execute a deed, and this agreement is signed only by the owner of the land, but is accepted and acted upon by the purchaser, time ceases to be of the essence of the contract: *Fulenwider v. Rowan*, 136 Ala. 288, 34 South. 975.

MAHONEY v. STATE.

[33 Ind. App. 655, 72 N. E. 151.]

CONTEMPT.—Statements Filed by the Judge of the court in a contempt proceeding as to matters which occurred in his presence and in open court will be treated as importing absolute verity. (p. 278.)

CONTEMPT.—Disorderly Conduct of Attorney.—If the conduct of an attorney is disorderly, and his demeanor toward the court insulting and of such character as to embarrass the proceedings of the court and the due administration of justice, the court has power on its own motion to punish summarily for the contempt. (p. 278.)

CONTEMPT.—Courts Possess Inherent Power to punish direct contempts. (p. 278.)

CONTEMPTS.—Power of Courts to punish for direct contempts cannot be destroyed nor materially abridged by statute. (p. 279.)

CONTEMPT.—Regulation of Procedure.—While it is not necessary to look to any statute to ascertain whether a particular act constitutes a contempt, still the legislature may, within limits, regulate the procedure in such cases. (p. 279.)

CONTEMPT.—Adjudication is Conviction.—If the court adjudges acts or conduct done in open court to be a contempt, its adjudication is a conviction, from which an appeal may be taken. (p. 280.)

CONTEMPT.—Appeal.—Presumption.—Presence of Accused.—If the record on appeal in a contempt proceeding is silent as to the presence of the accused when the proceedings were had against him, it must be presumed that he was present. (p. 281.)

CONTEMPT.—Appeal.—A recital in a motion to set aside a judgment in contempt proceedings, incorporated in the bill of exceptions, that such judgment was rendered without notice to or appearance of the accused, and without giving him any opportunity to be heard, cannot perform the office of a statement of such facts in the bill of exceptions, when such bill contains no evidence of irregular proceedings. (p. 282.)

CONTEMPT—Judgment—Time of Rendition and Entry.—An order-book entry in a contempt proceeding reciting that on a certain day "the following proceedings were had and entered of record," followed by a statement of the court's finding and judgment, does not conclusively show that the court did not, five days before, and when the accused was present, adjudge his acts and conduct to be a contempt. (p. 282.)

M. Winfield and M. B. Mahoney, for the appellant.

C. W. Miller, attorney general, C. C. Hadley, L. G. Rothschild and W. C. Geake, for the state.

MR. ROBINSON, J. Appellant appeals from a judgment assessing a fine of fifty dollars against him for a direct contempt of court. From a statement filed by the judge and entered of record December 21, 1903, it appears that during the trial of a criminal case, on December 16, 1903, in which appellant was an attorney for the accused, after the court had overruled an objection by appellant to a question asked a witness by the prosecuting attorney, appellant commenced to argue the question, when the court stated that the ruling had been made, and did not care to hear further argument, whereupon appellant, in a rude and offensive manner and in a loud tone, said to the court, "I want to know whether I am going to be heard in this case in the interest of my client or not." Whereupon the court replied that he would hear him when he desired to hear argument; otherwise, not. Afterward, during the examination of a witness, a question was asked by appellant which the court remarked the witness had already answered, whereupon the appellant referred to the reporter, saying, "I want to see whether the court is right or not." Afterward, when the court had ruled on the admission of certain evidence, appellant said there was no principle of law that would support such a proposition, and there was no reason in it, ²⁸⁷ whereupon the court stated to appellant that such remarks were improper, and that his conduct on several occasions during the trial had been improper and unbecoming a member of the bar. Appellant then rose to his feet and interrupted the court, and in an insulting and insolent manner said, "Now the court is talking again," and continued in substance to say that the court, not only in this trial, but in other trials, had taken exceptions to his conduct, that the court had permitted an examination of the jury contrary to an old and well-established rule of court, and on its own motion had intervened and had not permitted a witness to answer a question, and then began to argue about the merits of the case on trial. The court replied that the merits of the case on trial were not under

cussion, but that appellant's conduct as an attorney was, that appellant's conduct at different times during the trial had been disrespectful to the court, that the court would require him to maintain a respectful demeanor toward the court, and that if he did not, he would not hear him in the trial, and if it became necessary would cause him to be removed from the courtroom. At this point appellant interrupted the court, and in an insulting manner stated that he was ready to quit practice in that court whenever proper proceedings were brought to disbar him. The court replied that it did not deem it necessary to wait for such proceedings. Whereupon appellant turned to the court, and said in an insulting and insolent manner that "whenever the court was ready he was ready." "Upon the foregoing facts the court finds Mr. Michael F. Mahoney guilty of contempt of court, and fixes his fine to the state of Indiana in the sum of fifty dollars. He stands committed until the fine and costs are paid or replevied, and the sheriff will see that the judgment of the court is executed." Afterward, on December 23, 1903, appellant moved to set aside the judgment on the ground that the judgment is illegal and void, that it was rendered ⁶⁵⁸ without any notice to appellant, and without any appearance or arraignment and without giving appellant any opportunity to be heard or file any counter-statement in explanation, denial or extenuation, which motion was overruled.

As the statement filed is confined to matters that occurred in the presence of the judge and in open court, we must treat it as importing absolute verity: *Holman v. State*, 105 Ind. 513, 5 N. E. 556. We think the statement shows that the appellant was guilty of conduct which tended to interrupt and embarrass the proceedings of the court and to impede the due administration of justice. His conduct was disorderly, and his demeanor toward the court was insulting, and was such that the court might and should, on its own motion, have noticed and punished summarily: *Dodge v. State*, 140 Ind. 284, 39 N. E. 745. The only question is whether the fine was imposed through proper legal procedure. Appellant's counsel argue that the statute provides for arraignment, charge, answer, finding and judgment, and that the record does not disclose that these steps were followed. Aside from any power the legislature may attempt to confer, courts possess inherent power to punish direct attempts. It is a purely judicial power, an essential auxiliary to the prompt and efficient administration of the law. It flows from the nature and constitution of a court, is of the essence of a court's existence. It is a power as old as courts

themselves. It exists independent of any legislation, and can neither be destroyed nor materially abridged by the legislature: See *Brown v. Brown*, 4 Ind. 627, 58 Am. Dec. 641; *Ex parte Smith*, 28 Ind. 47; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Rudolph v. Landwerlen*, 92 Ind. 34; *Rapalje on Contempts*, sec. 1; *Holman v. State*, 105 Ind. 513, 5 N. E. 556; *Harkins v. State*, 125 Ind. 570, 25 N. E. 818; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. ed. 405.

While it is not necessary to look to any statute to ascertain whether a particular act does or does not constitute a contempt, still, the legislature may, within limits, regulate the procedure in such cases: *Harkins v. State*, 125 Ind. 570, 25 N. E. 818; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Cheadle v. State*, 110 Ind. 301, 59 Am. Rep. 199, 11 N. E. 426.

The statute (*Burns' Rev. Stats. 1901*, sec. 1023) makes the following provision for trial for direct contempt: "When any person shall be arraigned for a direct contempt in any court of record of this state, no affidavit, charge in writing, or complaint shall be required to be filed against him, but the court shall distinctly state the act, words, signs or gestures, or other conduct of the defendant which is alleged to constitute such contempt; and such statement shall be reduced to writing, either by the judge making it or by some reporter authorized by him to take it down when made; and the same shall be substantially set forth in the order of the court on the same, together with any statement made in explanation, extenuation or denial thereof which the defendant may make in response thereto; and the court shall thereupon pronounce judgment, either acquitting and discharging the defendant or inflicting such punishment upon him as may be consistent with the provisions of this act; and, if found guilty, the defendant shall have the right to except to the opinion and judgment of the court. And in all cases where the defendant may be adjudged to pay a fine of fifty dollars or more, or to be imprisoned for such contempt, he shall have the right, either before or after the payment of such fine or undergoing such imprisonment, to move the court to reconsider its opinion and judgment of the case, upon the facts before it or upon the affidavits of any or all persons who were actually present and heard or saw the conduct alleged to have constituted such contempt." This section further provides that upon these affidavits and the original statement the accused may move for a new trial and rescission of the judgment, and if the motion is overruled the accused may except and file a bill of

exceptions ⁶⁶⁰ as in other criminal cases. Provision is also made for an appeal.

We cannot agree with counsel that this statute expressly provides for arraignment, in the sense of that term in criminal procedure. Under the criminal code the arraignment of the accused consists of the reading of the indictment or information to him by the clerk: Burns' Rev. Stats. 1901, sec. 1831. And if the record, in such case, shows an arraignment, it necessarily shows the reading of the indictment or information to the accused: *Clare v. State*, 68 Ind. 17. But section 1023, *supra*, expressly states that no affidavit, charge in writing or complaint shall be required to be filed against the accused. It is true the section uses the word "arraigned" but it is used synonymously with "accused" or "charged": Webster's Dictionary; Soule's Synonyms. He could not be arraigned within the meaning of the criminal code where no affidavit, written charge or complaint had been filed against him. The statute clearly contemplates that the court may make the charge orally, which is afterward reduced to writing and the substance of it set out in the order of the court on the same. In *Holman v. State*, 105 Ind. 513, 5 N. E. 556, it is said to be very doubtful whether the legislature has power to require the judge to make any formal written charge, where the act constituting a direct contempt is committed during an open session of court and in the presence of the judge. The statute does not require that the statement made by the accused in explanation or denial of the charge shall be in writing. It cannot be doubted that conduct in the presence of the court might be of such character that the court could impose punishment summarily. In such case a trial is not contemplated. No issue is to be formed. When the court adjudges the acts or conduct to be a contempt its adjudication is a conviction. The accused may except and appeal; and if the punishment inflicted is a fine of fifty dollars or more, or imprisonment, provision ⁶⁶¹ is made for a motion for a new trial and rescission of the judgment and an appeal.

We agree with counsel that such proceedings should not be taken against the accused in his absence. But we cannot presume that the court did this. The record does not show that this was done. It does not affirmatively appear that appellant was present. It does not affirmatively appear that he was not present. It has been held time and again, both in civil and criminal cases, that the appellate tribunal must presume in favor of the regularity and validity of the proceedings of the trial, and, until the contrary is made to appear by the record,

this presumption must control. Thus in *Lillard v. State* 151 Ind. 322, 50 N. E. 383, a reversal was asked because the record did not show that the trial court, before pronouncing its judgment sentencing the defendant, informed him in regard to the verdict and called upon him to show legal cause why judgment should not be pronounced, under section 1923 of Burns' Revised Statutes of 1901, which provides that "when the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced upon him." The court said: "If the lower court, however, failed to discharge its duty toward the defendant in the manner required by the statute, in not informing him of the verdict and calling upon him to show cause, if any he had, the burden is upon him, on appeal, to show affirmatively such failure by the record; and, in the absence of such showing, we must, under the well-affirmed rule, presume that the trial court discharged its duty as the law exacted. The mere silence of the record, as in the case at bar, does not suffice to present the question which appellant seeks to have reviewed under his third assignment of error": See, also, *Campbell v. State*, 148 Ind. 527, 47 N. E. 221; *McCorkle v. State*, 14 Ind. 39; *Porter v. State*, 17 Ind. 415; *Ayres v. State*, 88 Ind. 275; *Shoffner v. State*, 93 Ind. 519; *Houk v. Barthold*, 73 Ind. 21.

*** It is true it is held that upon appeal in a criminal case the record must show affirmatively that the accused was arraigned, or waived it, and that he pleaded to the indictment or information, or that, standing mute and refusing to answer, a plea was entered for him by the court: *McJunkins v. State*, 10 Ind. 140; *Tindall v. State*, 71 Ind. 314; *Hicks v. State*, 111 Ind. 402, 12 N. E. 522; *Bowen v. State*, 108 Ind. 411, 9 N. E. 378; *Miller v. State*, 26 Ind. App. 152, 59 N. E. 287; *Manhattan Oil Co. v. State*, 26 Ind. App. 693, 60 N. E. 732. This ruling is based upon the positive terms of the statute: *Weir v. State*, 115 Ind. 210, 16 N. E. 631.

The motion to set aside the judgment is incorporated in a bill of exceptions. The bill contains nothing except the motion. One of the grounds of the motion is that the judgment was rendered without any notice or appearance, and without giving appellant any opportunity to be heard. But this recital in the motion cannot perform the office of a statement of the fact incorporated in a bill of exceptions. The bill itself contains no evidence of any irregular proceeding: See *Masterson v. State*,

144 Ind. 240, 43 N. E. 138; Elliott on Appellate Procedure, secs. 294, 815.

What we have said is upon the assumption that the record itself does not in any way show that appellant was present when charged with the contempt. But we do not think it can be said that the record conclusively shows that the alleged contempt was committed on December 16th and no action taken thereon until December 21st. The order-book entry recites that on the twenty-first day of December, 1903, "the following proceedings were had and entered of record in order-book No. 42, pages 150-153, as follows, to wit." This is followed with the statement, the substance of which we have already given, and the statement is followed immediately by the court's finding and judgment thereon as already set out in full. As the court is not required to make the charge in writing, we do not think it can be said that the record conclusively shows that no action was taken ~~was~~ by the court as to the alleged contempt until December 21st. It does not appear from the statement itself when it was reduced to writing. It only appears that the statement was not entered in the order-book until December 21st. The statute does not require that the charge shall be reduced to writing immediately upon its being made, but it requires that the charge (which may have been previously made orally) shall be reduced to writing, and "the same shall be substantially set forth in the order of the court on the same." The court could have made the charge orally on December 16th, when the acts complained of were committed, and when it appears appellant was present, and on that date could have adjudged appellant guilty of contempt, and afterward put the charge in writing and caused the same to be recorded on December 21st. There may have been no judgment until December 21st, when the statement was entered of record; but the statement does not necessarily show that the court did not, on December 16th, when appellant was present, adjudge the acts and conduct to be a contempt.

Judgment affirmed.

The Power to Punish for Contempt is the subject of a monographic note to *Clark v. People*, 12 Am. Dec. 178-186. The general rule is, that courts have power summarily to punish for contempt, and this power cannot be abridged by the legislature: *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, and cases cited in the cross-reference note thereto. That cases of contempt are not triable by jury, see *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624. And that the court may proceed without indictment, jury, or confronting the accused with the witnesses against him, see *State v. Fredlock*, 52 W. Va. 2, 94 Am. St. Rep. 932.

CASES
IN THE
SUPREME COURT
OF
IOWA.

COOK v. MARSHALL COUNTY.

[119 Iowa, 384, 93 N. W. 372.]

INTERSTATE COMMERCE—Original Packages—Cigarettes. Small pasteboard boxes, each containing ten cigarettes, separately sealed and stamped with a revenue stamp, shipped loose, unaddressed, but delivered to an express company for transportation, the company's receipt showing the number of packages and the person in another state to whom they are shipped, are not original packages so that the business of dealing therein can be brought within the privileges of interstate commerce. (p. 292.)

CONSTITUTIONAL LAW—Title of Statute.—If there is a "unity of object" in the various provisions of a statute, and that general object is indicated by the title of the act, then, no matter how multifarious the provisions of the act, it sufficiently complies with the constitution. (p. 293.)

CONSTITUTIONAL LAW—Title of Amendatory Statute.—The title, "An act to revise, amend, and codify the statutes in relation to crimes and their punishment," is sufficient to embrace a code section providing that "there shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property within or whereon any cigarettes" are sold or given away, or kept with intent to sell or give away, and that the tax shall be assessed and collected after the manner of the mullet liquor tax, but that it shall not be a bar to a prosecution for the penalties prescribed in another section already in existence and prohibiting the selling and giving away of cigarettes under a penalty of fine and imprisonment. (p. 297.)

CONSTITUTIONAL LAW—Title of Statute.—Acts of General Revision and codification under general and comprehensive titles are valid. (p. 297.)

CONSTITUTIONAL LAW—Uniform Operation of Statute.—A statute imposing a mullet tax on the sale of cigarettes is not unconstitutional because it exempts jobbers and wholesalers doing an interstate business with persons outside the state. (pp. 297, 298.)

Dunshee & Dorn and J. Parker, for the appellants.

Henry Stone, for the appellee.

³⁸⁵ WEAVER, J. The appellant Cook is a dealer in tobacco, cigars and cigarettes, carrying on his business in a building owned by Plunkett, the other appellant, in the city of Marshalltown. A mulct tax having been assessed against Cook under the provisions of section 5007 of the Code, appellants petitioned the board of supervisors to remit and cancel such tax on the ground that no cigarettes had ever been kept, sold or given away by Cook except in the original packages made by the manufacturer in another state, and in that form shipped directly to him in this state, and that therefore, the section of the Code referred to as applied to such sales is in violation of the constitution of the United States, which reserves to Congress the right and power to regulate interstate commerce. This petition was supported by affidavit of an employé of the shipper at St. Louis, in the state of Missouri, that the cigarettes sold and shipped to Cook were done up in pasteboard boxes containing ten cigarettes each (the printed record leaves a blank for the number in each box, but counsel for appellants state the number to be ten, and we will so consider it). The affidavit further states that the packages ³⁸⁶ were separately sealed and stamped with a revenue stamp, and adds that: "These packages were shipped to C. P. Cook absolutely loose, or at least neither the American Tobacco Company nor myself or any one of its other employées for it furnished any box, bale, wrapping or other covering for these packages, nor in any way attached them together. These packages were not separately addressed, nor were any of them addressed, but at the time they were delivered to the driver of the United States Express Company, which express company was the common carrier to whom the delivery was made, the said driver took a duplicate of the receipts he had given. These receipts showed the number of packages and the name of the person to whom they were to be sent, and from its duplicate receipts I suppose the express company had notice of the number to be delivered and the name of the consignee and his address." This petition being refused, an appeal was taken to the district court, where an amendment was filed, alleging that the statute providing for the mulct tax is invalid, because the subject matter of said section 5007 is not expressed or indicated in the title to the act in which it is found, as provided in the constitution of this state, and because it discriminates in favor of jobbers and

wholesalers doing an interstate business. A demurrer to the amended petition, as stating no ground or fact entitling petitioners to the relief demanded, having been sustained, and judgment entered against them for costs, the petitioners appeal.

1. We first consider whether the petitioners show themselves entitled to the protection afforded by the interstate commerce clause of the federal constitution. It is asserted that the traffic in which Cook was engaged was the receiving and selling of cigarettes in the original packages as shipped from the manufacturer in another state, and is therefore lawful under the rule applied in *Leisy v. Hardin*, 135 U. ²⁹⁷ S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128, and other cases of the same general nature, decided by the supreme court of the United States. So far as this branch of the case is concerned the question is whether ten cigarettes, put up, handled, shipped and sold in the manner indicated by the petition, is such an "original package" as is meant by the authorities which the appellant relies upon. As an original proposition, addressed to common sense, aided by a conscience of average enlightenment and uncomplicated by precedent, there would seem to be no room for doubt that this question should be answered in the negative. It must be admitted, however, that authorities are not wanting affording the appellants some ground to believe that any scheme or device, no matter how transparent the fraud, is sufficient to baffle the power of a sovereign state so long as it bears the magic legend "original package." This theory is founded upon what has been supposed to be the holding of the court of last resort in the cases already referred to; but, as we view it, those decisions do not justify the deductions made. The term "original package" is not to be found in the constitution, and has come into use simply as a convenient term or expression for one of the incidents ordinarily inseparable from interstate commerce. The term "imports" or "foreign commerce" or "interstate commerce" always implies the idea of goods, wares or merchandise manufactured, produced or prepared in one jurisdiction, and carried into another for the purpose of sale. There can be no such commerce without transportation or carriage. For convenience and safety in such transportation, most articles of commerce being shipped to an importer or buyer are combined into packages, encased in boxes or other wrapping, and directed to the proper consignee. In this form they do not ordinarily enter into the retail or general trade of the community, and the fact that the package is unbroken is an indication that the goods have not yet lost their

distinctive character ³⁸⁸ as imports, or become mingled with the mass of property subject solely to the jurisdiction of local authority.

The recognition of this feature by Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, is the foundation on which all subsequent "original package" decisions in the various courts of the land are sought to be justified. In this, as in some other notable instances, the principle then announced has been so distorted and wrested from its original simple meaning that, if the great jurist were permitted to return to the scene of his historic labors, he would doubtless hesitate long before acknowledging the legitimacy of the descent of the modern doctrine. It should not be overlooked that the pronouncement of Chief Justice Marshall upon which such reliance is placed was made in reference to foreign commerce only, and that the words so often quoted were employed in discussing the constitutional prohibition of duties and imposts by state authorities, and did not involve any consideration of interstate commerce: *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382. This distinction is noted and emphasized in the majority opinion in the late case of *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. Rep. 132, 45 L. ed. 224, hereinafter more particularly referred to.

The term "original package," as employed in law admits of no precise definition applicable to all cases. Generally, it is said to be a parcel, bundle, bale, box or case made up of or "packed" with some commodity with a view to its safety and convenient handling in transportation: *Keith v. State*, 91 Ala. 2, 8 South. 353, 10 L. R. A. 430; *State v. Board of Assessors*, 46 La. Ann. 146, 49 Am. St. Rep. 318, 15 South. 10; *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703, 48 S. W. 305, 50 L. R. A. 478; *Commonwealth v. Schollenberger*, 156 Pa. St. 201, 36 Am. St. Rep. 32, 27 Atl. 30, 22 L. R. A. 155. It does not necessarily mean that goods shall be inclosed in a tight or sealed receptacle: *McGregor v. Cone*, 104 Iowa, 465, ³⁸⁹ 65 Am. St. Rep. 522, 73 N. W. 1041, 39 L. R. A. 484; *State v. Chapman*, 1 S. Dak. 114, 47 N. W. 411, 10 L. R. A. 432. It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer. Indeed, the idea of an original package may well be made to cover certain forms of property which do not ordinarily admit of being "packed" or encased in any other manner than in the car or vessel in which they are transported. Such, for instance, as steel beams, threshing-machines, and other bulky

articles. Whether, in such cases, the unit or package for the purposes of interstate commerce is the carload, or cargo, or the entire consignment, or the individual articles of which the consignment is composed, is unnecessary for us to consider. Fortunately, as regards the very class of goods now in controversy, we are not left without a controlling precedent.

Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. Rep. 132, 45 L. ed. 224, recently decided by the supreme court of the United States, upholds the constitutionality of a statute of Tennessee prohibiting the sale of cigarettes in that state. There, as here, the nonresident manufactured and the resident agent or dealer, aided by a superserviceable common carrier, undertook to convert the interstate commerce privilege afforded by the federal constitution into a shield behind which to violate the law of the state with impunity. The plan adopted may be explained as follows: To conform to the internal revenue law of the United States, the manufacturer put the cigarettes into small pasteboard boxes of ten each. These boxes are about three inches in length and one and one-half inches in width, a convenient size for the vest pocket of the school-boy or man addicted to the use of tobacco in that form. In filling an order for these goods from a state where the traffic is unlawful, the seller instead of packing the requisite dozens or hundreds of thousands of boxes in a larger box or package, as would be done in legitimate commercial ³⁹⁰ transactions generally, placed the small boxes in a loose pile upon the floor of his warehouse, and notified the carrier, who came, gathered up the consignment in a basket, and put it in course of transportation to the consignee. By this device it was claimed that each box of ten cigarettes was to be considered an original package, which the importer might lawfully receive, hold, and sell without let or hindrance by the state authorities. The adoption of this doctrine would, of course, prove absolutely destructive of the right of the state to place any ban whatever upon the sale of this class of goods. The cause of good government and good morals is to be congratulated, however, upon the fact that a majority of the court refused to allow the last vestige of the police power of the state for the protection of its people to be thus obliterated. The opinion says: "The real question in this case is whether the size of the package in which the importation is actually made is to govern, or the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view."

The words we have italicized appear to afford the only proper or efficient test of this troublesome question as to what is an original package for the purposes of interstate commerce. Even this definition is capable of being abused at times to the detriment of the interests of the states, but in a much smaller degree than any other yet attempted. The further discussion by the court is so lucid and convincing in statement, and so applicable to the case at bar, we further quote: "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which from time immemorial foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and ^{and} distributing their contents among the several retail dealers throughout the state. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words 'original package' in their literal sense, a number of so-called 'original package' manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other states in minute packages, that they may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the state against their importation and sale. In all the cases which have heretofore arisen in this court, the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the state with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law, but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and when in a bona fide package of a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several states, we are bound to respect such laws, and to aid in their enforcement, so far as can be done without infring-

ing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a ³⁹² sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside of the state, and import it in minute quantities. There could hardly be stronger evidence of fraud than is shown by the facts of this case. . . . Now, the result of defendant's argument in this case is that citizens of Tennessee may, under the commerce clause of the constitution of the United States, bring into that state from other states cigarettes in unlimited quantities, and sell them despite the will of Tennessee, as expressed in its legislation. In other words, it is decided that the commerce clause of the constitution, by its own force, without any legislation by Congress, overrides the action of the state in a matter confessedly involving, in the judgment of its legislature, the health of its people. We cannot accept this view. The doctrine that the silence of Congress as to what property may be of right carried from one state to another means that every article of commerce may be carried into one state from another, and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. If this be not so, it follows that the reserve power of the state to protect the health of its people by reasonable regulations has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the state against its will of all kinds of property which may be fairly regarded as injurious in their use to health."

To the usual effort to bring this kind of traffic within the principle of *Brown v. Maryland*, the court quotes the language of Chief Justice Marshall, and adds: "This ³⁹³ sentence contains in a nutshell the whole doctrine upon the subject of original packages upon which so formidable a structure has been attempted to be erected in subsequent cases. Whether the decision would have been the same if the original packages in that case, instead of being bales of drygoods, or hogsheads, barrels or tierces of liquor, had been so minute in size as to permit their sale directly to consumers, may admit of considerable

doubt. Obviously, the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume it did not occur to the chief justice that by a skillful alteration of the size of the packages the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several states."

The scheme by which the tobacco company attempts to circumvent the laws of the state is appropriately denounced in the opinion as "a discreditable subterfuge, to which this court ought not to lend its countenance." The only point upon which counsel attempts to distinguish between the Austin case and the case at bar is in the fact that in the former it appears affirmatively that the express company made use of a basket in removing the loose pile of small pasteboard boxes from the floor of the company's warehouse, while in the latter no mention is made of the basket. The petition and affidavit, which constitutes the showing here made, are drawn with much carefulness and skill to make it clear that "neither the American Tobacco Company nor any of its employes furnished any box, bale, bag, wrapping or any covering for these packages, nor in any way attached them together," and that in this condition, without any mark or address upon them, they were delivered to the express company.

The care and precision with which we are told what the tobacco company did not do in making the shipment is ³⁹⁴ no less conspicuous than the omission to tell what its agent, the express company, did do in that regard. We think, however, it indicates no such material variance in the facts of the two cases as to affect the application of the rule. Conceding that the tobacco company scrupulously refrained from doing more than counting and pointing out the loose packages to the express company with directions to carry the same to the buyer in Marshalltown, yet we know, as a matter of common observation and immemorial usage, that this is not the manner "in which bona fide transactions are carried on between the manufacturer and wholesale dealer residing in different states," and is, therefore, not entitled to claim the exemptions attaching to interstate commerce. Still further we may rightfully assume that the express company, in receiving and shipping these little boxes, did it in a rational manner, not by handling or carrying the boxes as carry sand, one grain at a time, but by gathering them, if

not in baskets, in receptacles of some suitable and convenient kind; and in such case, under the doctrine of *McGregory v. Cone*, supra, the receptacle so used would be the original package, if, indeed, there be anything in the transaction entitled to that appellation. The extreme and unreasonable extension of the principle affirmed in *Brown v. Maryland*, has been the fruitful source of much annoyance and embarrassment in many of the states of the Union. And it is a striking, but just, commentary upon the perversion of the principle embodied in that decision, to note that practically the only beneficiaries of the modern doctrine of the sanctity of original packages in interstate commerce are the whisky seller, the cigarette manufacturer, and the dealer in bogus butter—a trinity which finds it profitable to force its wares upon states whose people, speaking through their constituted authorities, seek to exclude them ^{see} as injurious to public health and morals.

The demoralization thus resulting upon a denial of the right of the state to protect the lives, health and morals of its people is not overstated by Williams, J., in *Commonwealth v. Schollenberger*, supra, decided by the supreme court of Pennsylvania. Speaking of the claim there made that certain sales of oleomargarine in violation of a local statute were privileged, as being interstate commerce, he says: "Law-abiding citizens will not embark in a business which is forbidden by the laws of the state in which they live. Timid men are afraid to do so. This kind of operation is left, therefore, to those who have no respect for law, no interest in the public welfare, and no fear of public opinion. When such men deliberately determine to put money in their pockets by engaging in a business which the state has declared to be injurious to the public morals, the public health or the public peace, and has, therefore, forbidden altogether, or placed under strict police regulations, they are morally certain to seek immunity for themselves and their unlawful business by immediate flight to the sanctuary of the national constitution, and there laying hold on the horns of the altar of interstate commerce. The road to this refuge of lawbreakers is well beaten. There are signboards at every crossing on the route, and the intermediate stations for profitable rest wear conspicuous signs of invitation. The travelers over it are generally foreigners to the state whose laws they trample upon, and include a motley assortment of traders. Beginning with the peripatetic swindlers whose worthless wares are transported in tin trunks, which they carry in their hands, and who hunt their victims in

secluded villages and along the country roads, with an instinct that rarely fails, and running up or down the scale of lawbreakers to the men whose commercial operations extend to the sale of oleomargarine by the pound, and of intoxicating drinks by the pint, there is no man in the procession who is not a conscious and deliberate lawbreaker, and who does not set his possible ³⁹⁶ profits from a forbidden business above his duty to society or the state that protects him. These men seek to pervert a rule of law that has a wide and beneficial field of operation. They claim to be engaged in interstate commerce, and to be entitled to the protection of the general government, and against the police laws of the individual states, for that reason. . . . The mischief done and attempted in this manner under the guise of interstate commerce is so great, so open, and so difficult to suppress or punish that in many states besides this it has become a matter of general and sincere regret that the interstate commerce law was ever held applicable to trade in any article recognized throughout the civilized world as a proper subject for police regulation and control."

The decision of the supreme court of the United States which reversed the holding of the state court in these oleomargarine cases—*Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. ed. 49—turns principally upon the effect of a special verdict of the jury, and serves neither to dull nor turn aside the point of the quotation we have made. The duty of the courts to apply every available and legitimate remedy for the evils thus graphically set forth is plain. The case made by the appellants to bring their business within the privileges of interstate commerce is wholly without merit, and the holding of the trial court in respect thereto is clearly correct.

2. It is urged by appellants with much earnestness that the statute under which the disputed tax was levied is void, because it does not conform to section 29 of article 3 of the constitution of this state. The provision to which reference is made reads as follows: "Every act shall embrace but one subject and matters properly connected therewith which subject shall be expressed in the title." Section 5007 of the Code, to which objection is here raised, is found in title 24, "Of Crimes and their Punishment," and subtitle (chapter 11) "Of Offenses ³⁹⁷ Against Public Policy." The general title of the bill as it passed the legislature is "An act to revise, amend and codify the statutes in relation to crimes and their punishment." Section 5006 in chapter 11 prohibits the keeping for sale and the

selling and giving away of cigarettes under a penalty of fine and imprisonment. Section 5007 provides that "there shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation and upon the real property within or whereon any cigarettes . . . are sold or given away or kept with intent to be sold or bartered or given away under any pretext whatever." The tax is to be assessed and collected after the manner of the mulct liquor tax, but is not a bar to a prosecution for the penalties provided in section 5006. Both sections exempt from their provisions "jobbers and wholesalers doing an interstate business with persons outside of the state." The question arises whether section 5007 comes fairly within the scope of the title. The end sought to be obtained by the constitutional provision invoked by the appellants "was to prevent the union in the same act of incongruous matters and of objects having no connection, no relation." And with this it was designed to prevent surprise in legislation by having matters of one nature embraced in a bill whose title expressed another: *State v. Davis Co.* Judge, 2 Iowa, 281. This, it has often been held, does not require a construction forbidding the inclusion in one act of all matters germane to the main proposition or purpose sought to be effected, even though they are not specifically mentioned in the title. If there is a "unity of object" in the various provisions, and that general object is indicated by the title, then, no matter how multifarious the provisions of the act, it sufficiently complies with the constitution: *Santo v. State*, 2 Iowa, 208, 63 Am. Dec. 487; *Morford v. Unger*, 8 Iowa, 85; *Porter v. Thomson*, 22 Iowa, 391.

In this connection we may well note the development of this provision in our constitution, and the language ³⁹⁸ in which it is framed. In the constitution of 1846 it appears in these words (article 3): "Sec. 26. Every law shall embrace but one object, which shall be expressed in the title." Seemingly to avoid the embarrassments which might arise from a narrow construction of the rule as thus expressed, the framers of the present constitution changed it to read: "Every act shall embrace but one subject *and matters properly connected therewith* which subject shall be expressed in the title." The added words which we have italicized are highly important, and clearly indicate the intention that the rule shall be liberally interpreted. It is the general policy of every state in the Union to collect and restate from time to time the whole body of its statute law in a complete and systematic form or code, and we think it has never

been held by any court that this assembling under one head of various enactments tending to the same general object is not valid under the constitution. Any other conclusion would render valueless all efforts at codification. In *Johnson v. Harrison*, 47 Minn. 575, 28 Am. St. Rep. 382, 50 N. W. 923, we find the following clear and forceful discussion of the principle: "Any construction of this provision of the constitution that would interfere with the very commendable policy of incorporating the entire statutory law upon one general subject in a single act, instead of dividing it into a number of separate acts, would not only be contrary to its spirit, but also seriously embarrassing to honest legislation. All that is required is that the act should not include legislation so incongruous that it could not by any fair intendment be considered germane to the general subject. The subject may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject, and not several. The connection or relationship of several matters such as will render them germane to one subject and to each other can be of various kinds; as, for example, ³⁹⁹ of means to ends, of different subdivisions of the same subject, or that all are designed for the same purpose, or that both are designated by the same term. Neither is it necessary that the connection or relationship should be logical. It is enough that the matters are connected with and related to a single subject in popular signification. . . . Neither is the fact important that a law contains matters which might be and usually are contained in separate acts, or would be more logically classified as belonging to different subjects, provided only they are germane to the general subject of the act in which they are put. The legislature is not limited to the most logical or philosophical classification." Another court has said: "It is not intended to prohibit the uniting in one bill of any number of provisions having one general object fairly indicated by its title. The unity of the object must be sought in the end which the legislative act purposes to accomplish": *Walter v. Town of Union*, 33 N. J. L. 351; *Montclair Tp. v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391, 27 L. ed. 431. "The constitution is obeyed if all the provisions relate to the one subject indicated in the title, and parts of it, or incident to it, or reasonably connected with it, or in some sense auxiliary to the object in view": *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79; *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322. It is admissible to

include in a statute "means which are reasonably adapted to secure the objects indicated by the title": *Cohn v. People*, 149 Ill. 486, 41 Am. St. Rep. 304, 37 N. E. 60, 23 L. R. A. 821. To the same general effect, see *Cooley's Constitutional Limitations*, 4th ed., 175-178; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795, 24 S. E. 930, 31 L. R. A. 822; *Ewing v. Hoblitzelle*, 85 Mo. 64; *Grover v. Trustees*, 45 N. J. L. 401; *State v. Silver*, 9 Nev. 231; *Fahey v. State*, 27 Tex. App. 146, 11 Am. St. Rep. 182, 11 S. W. 108; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 27 N. E. 973; *State v. Mines*, 38 W. Va. 137, 18 S. E. 470.

Accepting the foregoing as announcing the correct rule of interpretation, we have next to inquire if the so-called "mulct tax" is in any sense germane to the general purpose of the act in which it is found. Bear in mind that this statute as a whole is an attempt to restate not only the law defining crimes and misdemeanors, but the remedies to be applied for suppressing and punishing the same. It certainly was competent for the legislature under this head to designate those acts which, in its wisdom, should be forbidden as against public policy, and to include therein the traffic in cigarettes. The authorities to this effect are too numerous and familiar to require citation. In codifying these statutes the legislature found already upon the statute-book the prohibition now carried into section 5006 (see *Laws 26th Gen. Assem., c. 96*), and in carrying it into the Code amended it by adding thereto section 5007, providing for the mulct. That it was intended as an aid in suppressing and punishing violations of the provisions of the preceding section seems too clear for controversy. While called a "tax," it is a "mulct" tax, and a mulct is "a fine imposed for an offense, a penalty": See "Mulct," *Anderson's Law Dictionary*, *Ebersole's Law Dictionary*, *Century Dictionary*. It is not even a form of license by indirection, for it contains no "bar clause," but, on the contrary, expressly provides that it may be exacted in addition to the penalties named in section 5006. The end sought by both these sections is identical—the suppression and prevention of the traffic in cigarettes. To use the language of the authorities to which we have referred, there is here a "unity of object," and the mulct is manifestly an auxiliary to the end sought to be accomplished. It is not wholly unlike those familiar enactments which provide for the punishment of a crime or misdemeanor, and unite them with a provision for ⁴⁰¹ assessing further penalty or damages in a civil proceeding. For in-

stance, section 4822 of the Code authorizes punishment for malicious trespass, and in addition thereto, authorizes the owner to recover three times the amount of his actual damage from the trespasser in a civil proceeding. Section 4834 prescribes the penalty for larceny of logs and timber floating in the rivers of the state, and is followed by section 4835, which subjects any person thus offending, whether convicted thereof in a criminal proceeding or not, to pay the owner of the stolen property twice the value thereof. If section 4835 can properly be held germane to the general purpose indicated in section 4834 (and we think none will dispute it), we see no good reason for applying any different rule to the sections to be construed in the case before us. Other instances of like legislation will readily suggest themselves in which a "tax" or "mulct" or "penalty" is provided as an additional weapon in the hands of the state for enforcing obedience to its commands. It must be remembered that title 24 of the Code is no more than what it purports to be—"an act to revise, amend and codify" statutes already existing. Those statutes, we must assume, were properly entitled; at least, no objection is raised thereto by appellants. Such being the case, if the title to the original act or acts is sufficient to embrace the matters covered by the provisions of the act amendatory thereof (and, as we have said, no objection of that nature is here raised), it is unnecessary to inquire whether the title to the amendatory act would of itself be sufficient: *Morford v. Unger*, 8 Iowa, 85; *Brandon v. State*, 16 Ind. 197; *Improvement Co. v. Arnold*, 46 Wis. 214, 49 N. W. 971; *State v. Ranson*, 73 Mo. 78; *State v. Algood*, 87 Tenn. 163, 10 S. W. 310; *Commonwealth v. Brown*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110; *People v. Parvin* (Cal.), 14 Pac. 783; *Lankford v. Commissioners*, 73 Md. 105, 20 Atl. 1017, 11 L. R. A. 491.

402 It may be that in a matter of original legislation a proper observance of the constitution would require the separation into separate acts of matters which we hold it proper to combine in a single general measure of amendment, revision, or codification. But that phase of the question is not now before us, and we need not consider it. It is not improper, however, to observe that by the adoption of the Code of 1897 the entire body of the statutory law of this state, consisting of many hundred separate acts, was classified and combined under twenty-six titles. Each of these titles of necessity contains widely variant provisions, but all having more or less appropriate relation to

the general topic to which such title is devoted. To adopt the strict doctrine for which appellants contend would unsettle the validity of a multitude of Code provisions, and open the door to legal chaos. True, even such an unfortunate result should not deter the court from accepting and announcing a rule which is clearly right, but it is a good and sufficient reason why we should pause and refuse to take a position attended with such grave consequences until its propriety and correctness are demonstrated beyond reasonable doubt. Moreover, it is a well-established principle, which this court has often applied, that it is the duty of the courts to give such a construction to an act, if possible, as will avoid the necessity of holding it void for unconstitutionality: *State v. Davis Co.* Judge, 2 Iowa, 282. It is a power which will not be resorted to unless the case be clear, decisive, and unavoidable: *Santo v. State*, supra. A late case decided by the supreme court of California—*Lewis v. Dunne*, 134 Cal. 291, 86 Am. St. Rep. 257, 66 Pac. 478, 55 L. R. A. 833—holds that an act embodying numerous amendments to different sections of the Code, and repealing others, is unconstitutional, but the validity of acts of general revision and codification under general and comprehensive titles is supported by the great weight of authorities: *Central of Georgia Ry. Co. v. State*, 403 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518; *Mathis v. State*, 31 Fla. 291, 12 South. 681; *McLane v. Paschal*, 8 Tex. Civ. App. 398, 28 S. W. 711; *Larned v. Tiernan*, 110 Ill. 173; *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *City of Hannibal v. Marion Co.*, 69 Mo. 571. See, also, the very exhaustive briefs of counsel and note to *Lewis v. Dunne*, 134 Cal. 291, 86 Am. St. Rep. 257, 66 Pac. 478, 55 L. R. A. 833, where the cases upon both sides are collated.

3. The further contention that the statute is unconstitutional because it is not uniform in its operation, and exempts certain persons from its observance, cannot be sustained. The reference made in the statute to jobbers and wholesale dealers doing business with customers outside of the state does not bear the construction which counsel put upon it. The evident purpose of the proviso is to avoid any interference with shipments made from such dealers in the state to points outside the state, and thus to escape, if possible, any objection to its validity based upon the exclusive control of Congress over interstate commerce. Whether it is effective for the purpose intended we need not consider, and the wisdom of its enactment is a question for the legislature alone. It operates alike upon all persons in like

situation, and therefore is of uniform operation within the meaning of the constitution: *Land Co. v. Soper*, 39 Iowa, 112; *Association v. Schrader*, 87 Iowa, 659, 55 N. W. 24, 20 L. R. A. 35; *Christie v. Investment Co.*, 82 Iowa, 360, 48 N. W. 94.

The judgment of the district court is affirmed.

The Principal Case was affirmed by the supreme court of the United States (*Cook v. Marshall County*, 196 U. S. 261, 25 Sup. Ct. Rep. 249 L. ed. 000), Mr. Justice Brown delivering the opinion of the court as follows: "This was a petition by the owner and tenant of a certain room in the city of Marshalltown, Iowa, addressed to the board of supervisors, for the remission of a tax of three hundred dollars imposed upon the business of selling cigarettes, which business was carried on by Charles P. Cook, one of the plaintiffs in error. The petition being denied, an appeal was taken to the district court, where a demurrer was interposed, which was sustained by that court, and an appeal taken to the supreme court, where the judgment of the district court was affirmed: 119 Iowa, 384, ante, p. 283, 93 N. W. 372.

"This case involves the constitutionality of section 5007 of the Iowa Code, imposing a tax of three hundred dollars per annum upon every person, and also upon the real property and the owner thereof whereon cigarettes are sold or kept for sale. The section is printed in full in the margin.*

"The facts of the case were that the plaintiff, Charles P. Cook, carried on a retail cigar and tobacco store upon premises leased by him from his coplaintiff. Cook ordered his cigarettes of the American Tobacco Company, at St. Louis. They were delivered to an express company, and brought by such company from St. Louis, or other places outside of the state of Iowa, directly to the place of business of the plaintiff, in small pasteboard boxes, containing ten cigarettes each, each package being sealed and stamped with the revenue stamp. These packages were shipped absolutely loose, and were not boxed, baled, wrapped, or covered, nor were they in any way attached together. Nothing appears in the record to indicate the means used in transporting these cigarettes from the factory of the manufacturer to the place of business of the retail dealer, and we are left to infer that they were shoveled into and out of a car, and delivered to plaintiffs in that condition. The packages were not separately or other

* Sec. 5007. Tax on Sale.—There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette packages, or cigarette wrapper, or any paper made or prepared for the use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with the intent to be sold, bartered or given away, under any pretense whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both real and personal, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette packages or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the state.

were addressed, but at the time they were delivered to the express company the driver gave a receipt showing the number of packages and the name of the person to whom they were to be sent, retaining a duplicate himself.

"The constitutionality of the act as applied to the plaintiffs was attacked upon two grounds: 1. That it was an attempt to interfere with the power of Congress to regulate commerce between the states; 2. That it denied to the plaintiffs the equal protection of the laws.

"The argument of the plaintiffs is the same as that which was pressed upon our attention a few years ago in *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. Rep. 132, 45 L. ed. 224, that the packages of ten cigarettes were each the original packages in which these cigarettes were imported from other states, and that, under the decisions of this court in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, *Leisy v. Hardin*, 135 U. S. 100, 3 Int. Com. Rep. 36, 10 Sup. Ct. Rep. 681, 34 L. ed. 128, and *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. ed. 49, they were entitled to the immunities attaching to original packages. We reviewed these and a large number of other cases in our opinion, and came to the conclusion that these boxes were in no just sense original packages within the spirit of the prior cases, and that their shipment in this form was not a bona fide transaction, but was merely a convenient subterfuge for evading the law forbidding the sale of cigarettes within the state. This case differs from that only in the fact that in the *Austin* case the packages were thrown loosely into baskets, which were shipped on board the train, and carried to Austin's place of business. These baskets, it is argued, might have been considered as the original packages.

"This difference, however, was not insisted upon as distinguishing the two cases in principle. Indeed, it was admitted to be one not of 'great magnitude or seeming legal significance.' The main argument of the plaintiffs was frankly addressed to a reconsideration of the principle involved in the *Austin* case, and a reinsistence upon the position there taken, that the packages in which the cigarettes were actually shipped must govern, and that we cannot look to the motives which actuated such shipment, or to the fact that ordinary importations of cigarettes were made in boxes containing a large number of these so-called original packages. We have carefully reconsidered the principle of that case, and, without repeating the arguments then used in the opinions, we have seen no reason to reverse or change the views there expressed.

"The term 'original package' is not defined by any statute, and is simply a convenient form of expression adopted by Chief Justice Marshall in *Brown v. Maryland*, to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported. It is not denied that, in the changed and changing conditions of commerce between the states, packages in which shipments may be made

from one state to another may be smaller than those 'bales, hogsheads, barrels, or tierces,' to which the term was originally applied by Chief Justice Marshall, but, whatever the form or size employed there must be a recognition of the fact that the transaction is a bona fide one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the states.

"In *Leisy v. Hardin*, 135 U. S. 100, 3 Int. Com. Rep. 36, 10 Sup. Ct. Rep. 681, 34 L. ed. 128, quarter barrels, and even one-eighth barrels and cases of beer, were recognized as original packages or kegs, though the size of such packages and the usual methods of transporting beer do not seem to have been made the subject of discussion. There is nothing in the opinion to indicate that it was not legitimate to ship beer in kegs of this size. So, too, in *Schollenberger v. Pennsylvania*, oleomargarine transported and sold in packages of ten pounds weight was recognized as bona fide, but it was expressly found by the justice in that case that the package was an original package, as required by the act of Congress, and was of such 'form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and that said form, size, and weight were adopted in good faith, and not for the purpose of evading the laws of the commonwealth of Pennsylvania.' The said package being one of a number of similar packages forming one consignment, shipped by the said company to the said defendant. While it may be impossible to define the size or shape of an original package, the principle upon which the doctrine is founded would not justify us in holding that any package which could not be commercially transported from one state to another as a separate importation could be considered as an original package.

"But it is insisted with much earnestness that, in determining the lawfulness of sales in original packages, we are bound to consider that package as original in which the articles were actually shipped, particularly where Congress, for the purpose of taxation, has prescribed a certain size of package to be separately stamped, and that we have no right to look beyond the letter of the term, and inquire into the motives which dictated the size of the packages in each case. This argument was also made in the *Austin* case, was considered at some length, and held to be unsound. In delivering the opinion we said (p. 359, Sup. Ct. Rep., p. 138, L. ed., p. 232): 'The real question in this case is whether the size of the package in which the importation is actually made is to govern, or the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country.'

"While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet, where the lawfulness or unlawfulness of the act is made an issue, the intent of the actor may have a material bearing in characterizing the transaction. We have had frequent occasions to treat of this subject in passing upon the validity of legislative acts or municipal ordinances. So, where the lawfulness of the method used for transporting goods from one state to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the state. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the constitution is invoked as a cover for fraudulent dealing, and is no defense to a prosecution under the state law.

"The power of Congress to regulate commerce among the states is perhaps the most benign gift of the constitution. Indeed, it may be said that without it the constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial states of exacting duties upon the importation of goods destined for the interior of the country or for other states. The vast territory to the west of the Alleghanies had not yet been developed or subdivided into states, but the evil had already become so flagrant that it threatened an utter dissolution of the confederacy. The article was adopted that all of states of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal commerce of the country. But the same policy which authorizes the use of this power as a shield to protect commerce from the vexatious interference of the states forbids its employment as a sword to assail measures designed for the preservation of the public health, morals, and comfort. States may differ among themselves as to the necessity and scope of such measures, but so long as they are adopted in good faith, with an eye single to the public welfare, they are as much entitled to the recognition of the general government as if they were uniformly adopted by all the states.

"While this court has been alert to protect the rights of nonresident citizens, and has felt it its duty, not always with the approbation of the state courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the states, it will not lend its sanction to those who deliberately plan to debauch the public conscience and set at naught the laws of a state. The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the state are equally so, and it is our duty to harmonize them. Undoubtedly, a law may sometimes be success-

fully and legally avoided, if not evaded; but it behooves one stakes his case upon the letter of the constitution not to be wholly oblivious of its spirit. In this case we cannot hold that plaintiffs entitled to its immunities without striking a serious blow at the right of the states to administer their own internal affairs.

"2. The argument that section 5007 of the Iowa Code denies to plaintiffs the equal protection of the laws is based upon an alleged discrimination arising from the final sentence that 'the provisions of this section shall not apply to the sales by jobbers and wholesalers doing an interstate business with customers outside of the state.'

"We are referred in this connection to a series of well-known cases arising under the anti-trust laws of the several states, to the effect that laws against combinations in trade must be uniform in their application as applied to all persons within the same general class. The leading case upon this point is *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679, where a law of Illinois against combinations to regulate prices and productions, and to create restrictions, was held to be invalid by reason of the exemption of agricultural productions or livestock, while in the hands of the producer or raiser.

"A similar case is that of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92, wherein a statute of Kansas regulating the prices to be paid for the use of public cattle stockyards was held invalid by reason of the fact that it was intended to apply only to the stockyards of Kansas City, and not to other companies or corporations engaged in like business in other portions of the state.

"These cases, however, have but limited application to laws imposing taxes, where the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism: *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. Rep. 57, 29 L. ed. 414; *Mago v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 44 L. ed. 1037; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 20 Sup. Ct. Rep. 43, 45 L. ed. 102; *Bell's Gap R. Co. v. Pennsylvania*, 184 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892.

"This distinction was recognized by Mr. Justice Harlan in *Connolly v. Union Sewer Pipe Co.*, on page 562 (46 L. ed., p. 690, 22 Sup. Ct. Rep., p. 440), wherein it is said: 'A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States so long as the classification does not invade rights secured by the constitution of the United States.' It can scarcely be doubted that if the *Connolly* case had dealt with the subject of taxation, a discriminatory tax upon producers of agricultural products, either greater or less than that imposed upon other manufacturers or producers, might have been held valid without denying to either party the equal

protection of the laws. The holding in that case was simply that, considering that the object of the statute was to prevent combinations of capital or skill for certain purposes, the exemption of farmers was based upon no sound distinction, and rendered the law invalid as to other classes included with it.

"There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the state. They are two entirely distinct occupations. One sells at retail, the other at wholesale; one to the public generally, and the other to a particular class; one within the state, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned.

"Why the legislature should have made the distinction found in section 5007 is not entirely clear, but it probably arose from the belief that the imposition of a license tax upon wholesale exporters of cigarettes would be as much an interference with interstate commerce as the imposition of a similar tax upon importers from abroad was held to be in *Brown v. Maryland*. We are satisfied the section is not open to the objection of denying to the dealers in cigarettes the equal protection of the laws.

"The judgment of the supreme court is, therefore, affirmed."

"WHITE, J., concurring. The only difference between this and the *Austin* case is that in this no basket was used to hold the many small packages shipped at one and the same time to the same person. In my opinion, such fact is not sufficient to take the case out of the reach of the reasoning stated by me for concurring in the decree in the *Austin* case. For the reasons given for my concurrence in that case I concur in the judgment rendered in this.

"The Chief Justice, Mr. Justice Brewer, and Mr. Justice Peckham dissented."

HODGE v. MUSCATINE COUNTY.

[121 Iowa, 482, 96 N. W. 968.]

CONSTITUTIONAL LAW—Mulet Cigarette Tax—Statute

Construction.—Where a code section imposes a tax on buildings used in the manufacture or sale of cigarettes, and provides that the tax shall be “assessed, collected, and distributed” in the same manner as the mulet liquor tax, the provisions of the liquor tax law concerning assessment and collection became a part of the cigarette tax law and should be considered in determining its constitutionality. (p. 307.)

CONSTITUTIONAL LAW—Mulet Cigarette Tax.—A code section imposing a mulet tax on the sale of cigarettes is not unconstitutional because it provides that the payment of the tax is not a condition to a prosecution under another code section, which absolutely prohibits the sale of cigarettes. (p. 308.)

CONSTITUTIONAL LAW—Cigarette Tax—Notice.—A code section imposing a tax on venders of cigarettes and on buildings wherein they are sold, is not unconstitutional because not providing for notice of the assessment of the tax to such persons, other than the provisions of the code providing for review by the board of supervisors with power to remit. (p. 311.)

CONSTITUTIONAL LAW—Cigarette Tax—Summary Collection.—A statute imposing a mulet cigarette tax is not unconstitutional because providing for collection by a summary method. (p. 311.)

Dunshee & Dorn and J. Parker, for the appellants.

No appearance for the appellee.

483 DEEMER, J. As the case involves the constitutionality of certain statutes, it seems necessary, although they are familiar to the profession, to set some of them out in extenso. Section 5006 of the Code forbids in general terms the manufacture, sale, exchange or disposition of cigarettes or cigarette paper: Section 5007 reads as follows: “Tax on Sale.—There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrappers, or any paper made or prepared for use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away under any pretense whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulet liquor tax, and shall be a perpetual lien on all property, both personal and real, used in connection

with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the state."

The sections referred to in section 5007, relating to the "assessment, collection and distribution" of the taxes provided for therein, are in substance (before amendment by the Twenty-Ninth General Assembly) as follows:

"Sec. 2433. In the month of December, March, June and September of each year and before the twentieth day of each of said months the assessor shall return to the auditor a list of persons liable to the tax and a description of the real property whereon the business has been carried on."

⁴⁸⁴ "Sec. 2436. On the first day of January, April, July and October of each year there shall be due and payable from each person so returned to the county auditor a quarterly installment of the mulct tax herein provided for, which shall be a lien upon the real property wherein such business is returned as being carried on, whether the person carrying on such a business or maintaining such place is correctly described or not. If such installment is not paid within one month after it becomes due and payable, a penalty of twenty per cent attaches together with one per cent per month thereafter until it is paid. The person so assessed is liable for at least one quarterly installment whether he quits the business or not.

"Sec. 2437. On the last day of December, March, June and September of each year the county auditor shall certify to the county treasurer a complete list of the names returned to him by the assessor, with a description of the real estate and the names of the occupant, and the owner or agent of such property.

"Sec. 2438. The county treasurer shall thereupon enter upon the book known as the mulct tax book a quarterly installment of the mulct tax as due and payable by the person carrying on such business, as a lien and charge upon and against the real property wherein or whereon such business is carried on.

"Sec. 2439. After the expiration of one month from the date of when such tax becomes due, if not paid, it shall be delinquent and collectible by the treasurer in the same method as that in which other delinquent taxes are collectible and all the provisions as to collection of other delinquent taxes shall apply. Tax

sales for said delinquent taxes shall also be made on the first Monday in June of each year.

"Sec. 2440. At any time after a quarterly installment of such taxes becomes delinquent, the treasurer may ⁴⁸⁵ collect the same by seizing and selling any personal property used in connection with the business or in maintaining the place."

These are all the provisions of the mulct liquor law with reference to the assessment and collection of the liquor mulct tax. The following provisions of the liquor law with reference to the remission of taxes assessed erroneously are claimed to be applicable to the cigarette business, and in view of such claim we give an abstract of such provisions:

"Sec. 2441. At the meeting of the board of supervisors next following the listing as aforesaid, application may be made to the board to remit the tax by petition duly verified and filed with the county auditor at least eight days before the time for the consideration of the case, and notice for the same length of time must be served on the county attorney in writing. The averments of the petition shall be deemed denied and witnesses may be examined, oath being administered by the chairman of the board with the same effect as to penalties for testifying falsely as if administered in court.

"Sec. 2442. The owner of the property may be heard in support of his application and evidence of the general reputation of the place shall be admissible. If it be found by a majority vote of the board that the tax is proper it shall stand; otherwise it shall be remitted. Either the petitioner or the county attorney may appeal to the district court and if the petitioner appeals he shall be required to give bond for costs accrued and to accrue, whereupon the auditor shall file a transcript in the office of the clerk."

"Sec. 2444. On appeal the trial shall be conducted as in an equitable cause."

Appellants contend that section 5007 is void, because it deprives, or may deprive, citizens of their property without due process of law, in that: 1. The law ⁴⁸⁶ contains no provision for notice to either dealer or real estate owner; 2. The character imposed by section 5007 is in the nature of a criminal penalty and the measures provided for its enforcement and collection are not adapted to the ends sought; 3. The attempt to enforce a criminal penalty through the taxing machinery of the state is unconstitutional, and contrary to the established principles of justice.

tice; 4. The principles embodied in the law in question are arbitrary, unusual and unknown to "the law of the land," as that term is used and intended in all constitutions. The petition also challenged the act because it was an attempt to regulate interstate commerce, and therefore void. This point is not insisted upon, for the reason, we suppose, that under a substantially similar state of facts it was held in Cook v. Marshall County, 119 Iowa, 384, 93 N. W. 372, that there was no merit in the contention. That case also holds the act in question

as properly entitled, and that it is uniform in its operation.

The objections now made to the enactment, as stated by counsel in the quotation made from their brief, nearly all revolve round the central thought that it amounts to taking of plaintiff's property without due process of law, and is contrary to the law of the land. Incidental to this is the claim that sections 2441, 2442 and 2444 do not apply to the case. This is bottomed on the notion that section 5007 does not refer to these sections either in terms or by necessary implication. The reference to the mulct liquor tax law is as follows: "Such tax . . . shall be assessed, collected and distributed in the same manner as the mulct liquors tax." Sections 2441 et seq. are found in this mulct liquor tax law, and it seems to us they refer to the assessment and collection of that tax. They are a part of the proceedings with reference to the assessment and collection of the mulct tax, and are as much a part of the proceedings as if written out at length in section 5007, before quoted. A section ⁴⁸⁷ which relates to the remission or revocation of the tax when embodied in the act authorizing its assessment, and evidently forming one of the inducements to the passage of the act, is as much a part of the law relating to the assessment and collection of the tax as that part expressly authorizing the levy and collection thereof. And in determining the constitutionality of a statute imposing a tax it would be unjust and unreasonable to divorce it from other provisions of the same law which gave to the person against whom the tax is to be assessed, and from whom the tax is to be collected, a remedy for avoiding that tax. The whole act relating to this subject and germane to the purposes and objects thereof should be considered in arriving at its constitutionality. These sections of the mulct liquor tax law relating to what may be called the remission of the tax, really relate to its enforcement or assessment, and should be considered in determining the constitutionality of section 5007. With this conclusion in mind, we now go to the points made by counsel against the validity of the law.

It differs from the liquor mulct tax in that the payment thereof does not constitute a bar to prosecutions under section 5007, which absolutely prohibits the sale of cigarettes. In this it is peculiar, and this peculiarity constitutes the basis of the attack made upon it. The tax imposed by the mulct liquor law has been held to be a charge or license exacted for the privilege of carrying on the business of vending liquors: *Smith v. Skow*, 104 Iowa, 640, 66 N. W. 893. And in *Re Smith*, 104 Iowa, 1073 N. W. 605, it is held that, as the tax is assessed and levied by virtue of a general law upon all premises and persons who come within the provisions of the act, the persons liable to the same must appear and pay the same without notice. In *opinion* it is said: "No notice to the lot owner of the assessment and levy was necessary. . . . There was no more necessity of notice to the property owner than in ⁴⁸⁸ cases of taxes generally." In *Ferry v. Deneen* (Iowa), 82 N. W. 424, it is said: "It is apparent, taking all the provisions of this act together, that the amount imposed, while called a 'tax,' is at the same time a penalty. We do not think all the rules governing ordinary taxes should control here. . . . The levy is made by law, . . . and, as used in the act, means scarcely anything more than a formal approval." As to the vender of either cigarettes or liquors, no notice of the assessments or levy for the tax is necessary. The tax is specific, and operates alone upon all who engage in the business. The amount is fixed, and there is nothing left to inquire into and determine: *Ferry v. Campbell*, 110 Iowa, 294, 81 N. W. 604, 50 L. R. A. 909; *Gatch v. Des Moines*, 63 Iowa, 718, 18 N. W. 310.

But it is contended that the owner of property who is not directly engaged in the unlawful business is entitled to notice and an opportunity to be heard, before a tax may be legally levied against his property, and that, as the law does not require such notice, it is invalid. In order to solve this question it is necessary to investigate a little more closely into the nature of the tax imposed by section 5007. It is clearly not a license for it does not grant permission to do an act which, without such permission, would be invalid: *State v. Hipp*, 38 Ohio 206; *Chilvers v. People*, 11 Mich. 43. It is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. It confers no right, but it poses an impediment to the transaction of the business. It is merely a tax on that business, levied to meet the burdens in

posed upon the general public by what is thought to be the result upon the human race, and particularly upon children, of the use of cigarettes. Indemnity and protection to the public against evils resulting from the nature and character of the business is the central thought. It also partakes of the nature of a police regulation, but it is not ⁴⁸⁹ to be wholly so regarded. Indeed, we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaiming it invalid: 2 *Desty on Taxation*, 1384. Being a tax, it was competent for the legislature to prescribe the proceedings and processes for its collection. From the beginning the people of this country have collected taxes through administrative officers, and there has been no suggestion that ordinary judicial processes were necessary to meet the constitutional guaranty of "due process of law": *Cooley on Taxation*, 49. Power of taxation is inherent in sovereignty, and this power, it has been said, "in its nature acknowledges no boundary." As said by the great chief justice in *McCulloch v. Maryland*, 4 *Wheat*. 428: "The only security against the abuse of the power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." The term "due process of law" is often misapprehended or misapplied. Indeed, it seems impossible to give a definition which is at once perspicuous and satisfactory. When applied to taxation, regard must be had of the nature of the power. As said in *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 *Sup. Ct. Rep.* 663, 28 *L. ed.* 569: "The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the constitution of the United States. It may touch property in every shape, . . . and the amount of the taxation may be determined by the value of the property, or its use or productiveness. It may touch business in the almost infinite forms in which it is conducted, . . . unless restrained by provisions of the federal constitution. The power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within its jurisdiction." ⁴⁹⁰ Following this principle, it has been held that a statute of the state of Michigan, authorizing the treasurer to levy by distress, and sell any goods or chattels found in the possession of the tax debtor, and that no claim of property made thereto by any other person

should be available to prevent the sale, was valid: *Sears v. C. trell*, 5 Mich. 251. See, also, *Sheldon v. Van Buskirk*, 2 N. 473. We need not go to this extent in the case now before us, although we have recognized the principle as applied to keepers' liens in *Brown Bros. v. Hunt*, 103 Iowa, 586, 64 A. St. Rep. 198, 72 N. W. 765, 39 L. R. A. 291. On the authority of the supreme court of the United States, we do hold that, to the person actually engaged in the business, it is not necessary that he be present, or that he have an opportunity to be present, when the assessment is made: *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *State R. R. Tax Cases*, 92 U. S. 575, 23 L. ed. 663. As to the owner of the property, if a notice or opportunity to be heard be necessary, it is sufficient if he be given an opportunity for contesting the charge in the ordinary courts of justice, with such notice to the person, and such proceeding in regard to the property, as is appropriate to the nature of the case: *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

The supreme court of the United States has uniformly adhered to the doctrine that a tax law which provides for a board of revision authorized to hear complaints respecting the justice of an assessment, and prescribes the time during which and the place where such complaints may be made, meets all constitutional requirements: *Palmer v. McMahon*, 133 U. S. 6, 10 Sup. Ct. Rep. 327, 33 L. ed. 772, and cases cited; *Glider v. Harrington*, 189 U. S. 255, 23 Sup. Ct. Rep. 574, 47 L. ed. 798 (which sustains a similar provision to the act in question). See, also, *Towns v. Klamath Co.*, 33 Or. 225, 53 Pac. 6; *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. Rep. 750, 38 L. ed. 637. We have heretofore given our adherence to this doctrine. In *Trustees of Griswold College v. City of Iowa*, 634, 22 N. W. 904, we said: "It seems to be agreed, therefore, that property taken for the nonpayment of taxes is not taken without due process of law if the taxpayer is afforded an opportunity to be heard in relation to the tax, though it be only before the officers clothed with power to assess": See, also, *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886. Indeed this rule seems to be elementary: *Board etc. v. Central R. R. Co.*, 10 N. J. L. 146, 4 Atl. 578; *Lent v. Tillson*, 72 Cal. 404, 14 P. 71; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682. An act similar to the one in question was sustained by the supreme court of Ohio in *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 271. We are constrained to hold that sections 2441 et seq. sa

the act from the claim of unconstitutionality because of want of notice and opportunity to be heard. The regular meetings of the board are fixed by law, and of these all persons must take notice.

What we have said, and the authorities already cited, answer most of the other contentions made by appellants. There is no requirement of law that such taxes must be collected through judicial proceedings. They may be enforced through summary processes, such as distraint or tax sale. This is well established by the cases already cited. The two cases relied upon by appellant—*McBride v. Adams*, 70 Miss. 716, 12 South. 699, and *Chauvin v. Valiton*, 9 Mont. 451, 20 Pac. 658, 3 L. R. A. 196—are not in point. The first involved a law imposing a fine or penalty for doing an illegal act, which was to be assessed and collected as a tax. This was held invalid because not due process of law. In the second the legislature of Montana undertook to make a license a lien on property, and to provide for the collection thereof by summary process. This was held invalid because of want of notice or opportunity to be heard. In that case the owner of the property was not given an opportunity to contest the charge.

⁴⁹³ The unreasonableness of the act is not a matter for our consideration. There is nothing arbitrary in a statute which provides for the collection of a tax by summary process. Such proceedings are necessary to secure prompt payment. They existed long before the constitution was formed, and are in accord with the law of the land. The trial court was right in sustaining the demurrer to the petition, and its judgment is affirmed.

The Principal Case was affirmed by the supreme court of the United States (*Hodge v. Muscatine County*, 196 U. S. 276, 25 Sup. Ct. Rep. 237, 49 L. ed. 000), Mr. Justice Brown delivering the opinion of the court as follows:

"This was a petition in the district court by the owner and tenant of certain real estate in Muscatine, used for a tobacconist's shop, to enjoin the defendants from assessing and collecting a tax of two hundred and forty dollars, upon the ground of the unconstitutionality of the law.

"Demurrers were interposed to the petition and to certain amendments thereto, which were sustained, the bill dismissed, and an appeal taken to the supreme court of Iowa, which affirmed the judgment of the court below: 121 Iowa, 482, ante, p. 304, 96 N. W. 968.

"This case involves the same questions as those just disposed of in *Cook v. Marshall County*, 196 U. S. 261, ante, p. 298, 25 Sup.

Rep. 233, and in addition thereto the point is made that the law of Iowa deny to the owner of property leased for the sale of cigarettes the process of law.

"To answer satisfactorily the question thus presented, it is necessary to consider the laws of Iowa respecting the tax upon cigarette dealers, and the methods of enforcing the same.

"By section 5006 a fine and imprisonment are imposed for selling cigarettes. By section 5007, printed in full in the Marshall Court case, a tax of three hundred dollars per annum is assessed 'against every person . . . and upon the real property and the owner thereof whereon cigarettes, etc., are sold, or kept with intent to be sold, with a provision that 'such tax shall be in addition to all other taxes and penalties, shall be assessed, collected, and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon the property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting' the selling of cigarettes.

"This assessment is made collectible as is a similar charge made upon dealers in liquor as follows: By section 2433 the assessor makes quarterly returns to the auditor of the persons liable to the tax, with a description of the real property whereon the business has been carried. By section 2436 the charge is made payable in quarterly installments, and shall be a lien upon the real property. By section 2437 the auditor certifies quarterly to the county treasurer a list of the names returned to him by the assessor, with a description of the names of the tenant and owner. By section 2438 the county treasurer enters upon the mulct tax book a quarterly installment of the tax as a lien and charge upon the real property. By section 2439, if the tax is not paid within a month, it shall be considered delinquent, and be collectible as other delinquent taxes. By section 2440 the treasurer may collect the same after it has become delinquent, by seizing and selling any personal property. By section 2441 application may be made to the board of supervisors to remit the tax by petition duly verified and filed with the county auditor eight days before the time set for the consideration of the case, notice of which must be served upon the county attorney. By section 2442 the owner of the property may be heard in support of his application. A majority of the board determines whether the tax shall stand or be remitted, and either party may take an appeal to the district court. These are all of the provisions of the law material to be considered.

"We do not deem it necessary to affix a definition to the character of the tax imposed by section 5007. It is certainly not an ordinary license tax, as the payment of such tax is no bar to a prosecution for selling cigarettes under section 5006. In *Smith v. Skow*, 97 Iowa, 640, N. W. 893, it is said, in speaking of the mulct liquor tax, to which this is analogous, that though called a tax in the statute, it is not in fact a tax as we usually use the word. 'It is in reality a char-

or license for carrying on the business of vending liquors, which charge is made a lien upon all property used or connected with the business.' In *Ferry v. Deneen* (Iowa), 82 N. W. 424, it is observed by the same court, 'it is apparent, taking all the provisions of this act together, that the amount imposed, while called a "tax," is, at the same time, a penalty.'

"But, in the opinion of the court in the case under consideration, the charge imposed by section 5007 is said to be 'clearly not a license, for it does not grant permission to do an act which, without such permission, would be invalid, . . . [that] it is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. . . . Indeed, we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid. . . . Being a tax, it was competent for the legislature to prescribe the proceedings and processes for its collection.'

"This being the latest expression of opinion of the supreme court of Iowa, we accept it for the purposes of this case. If it be not a construction binding upon us, it is, at least, a construction which we ought to follow, unless we are clearly of opinion that it is wrong.

"In the case of *McBride v. State Revenue Agent*, 70 Miss. 716, 12 South 699, cited by plaintiffs, it was held that a statute providing that a person selling liquor unlawfully should be subject to pay, 'where the offense is committed,' the sum of five hundred dollars, and should also be liable to a 'criminal prosecution,' imposed a penalty, and not a tax, and that a proceeding to collect such penalty by distress was unconstitutional; but a distinction was drawn in that case between a penalty and a tax, and it was intimated that a proceeding by distress to collect a tax would not be open to a like objection.

"It is not easy to draw an exact line of demarcation between a tax and a penalty, but, in view of the fact that the statute denominates the assessment a 'tax,' and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal prosecution, we cannot go far afield in treating it as a tax rather than a penalty. Section 5006 does, indeed, impose a penalty, but section 5007 imposes a tax, with an additional provision that the payment of the tax shall not absolve the party from the penalty. It would be a distortion of the words employed to speak of section 5007 as imposing an additional penalty. The act itself provides in terms that such a tax shall be an addition to all other taxes and penalties, and elaborate provision is made for its enforcement. The mere fact that the charge, whatever it may be, is made a lien upon the real estate, and a personal claim against the landlord, indicates that it is in the nature of a tax rather than a penalty.

"There is no conflict between the two sections, the state reserving to itself an election to proceed under the one or the other. If Congress may provide that a license granted by it to sell liquors shall not be construed to authorize the sale of such liquors when prohibited by the laws of the state, as was held by this court in *McGuire v. Massachusetts*, 3 Wall. 387, 18 L. ed. 164, *License Tax Cases*, 5 Wall. 463, 18 L. ed. 497, *Commonwealth v. Crane*, 158 Mass. 218, 33 N. E. 398, *Parvear v. Massachusetts*, 5 Wall. 475, 18 L. ed. 608, we see no reason why the state itself may not exercise the same power, and reserve to itself the right to tax or prohibit, as in individual cases it may see fit.

"2. Coming now to the provisions for its enforcement, it is entirely clear that, as to the person actually carrying on the business, no notice of the assessment or levy of the tax is necessary. If the person carries on the business, the imposition of the tax follows as a matter of course. There is no discretion as to the amount: *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Hager v. Reclamation Dist.* No. 108, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 569; *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. Rep. 20, 47 L. ed. 70; *In re Smith*, 104 Iowa, 199, 73 N. W. 605.

"It was within the power of the legislature to make the tax a lien upon the property whereon the business was carried. If general taxes upon real estate and specific taxes for improvements thereto, including pavements, sidewalks, sewers, the opening of streets and keeping them clean, may be made liens upon the property affected, it is difficult to see why a tax upon the business carried on upon such property may not be made a lien as well as a claim against the owner. The owner is not only chargeable with a knowledge of the law in respect thereto, but he is presumed to know the business there carried on, and to have let the property with knowledge that it might become encumbered by a tax imposed upon such business: *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 64 Am. St. Rep. 198, 72 N. W. 765, 39 L. R. A. 291; *Polk County v. Hierb*, 37 Iowa, 367; *State v. Snyder*, 34 Kan. 425, 8 Pac. 860; *Hardten v. State*, 32 Kan. 637, 5 Pac. 212; *Sears v. Cottrell*, 5 Mich. 251; *Waldron v. Lee*, 5 Pick. 323; *Spencer v. M'Gowen*, 13 Wend. 256; *Simpson v. Serviss*, 3 Ohio C. C. 433.

"Acts of Congress impressing liens upon real estate for taxes or penalties arising from business illegally carried on there have been the frequent subject of controversy in this court.

"Conceding that the land owner is entitled to notice before he can be personally liable, or before his property can be impressed with a lien, we are of opinion that he is protected by sections 2441 and 2442, which permit him to make application at the meeting of the board of supervisors next following the listing of the property, the sessions of which board are fixed by law (Iowa Code, sec. 412), to remit the tax. This application may be made at any time after the

property has been assessed, upon eight days' notice being given to the county attorney. Witnesses are examined under oath before the board, which determines by a majority vote whether the tax shall stand or be remitted. If the petition be denied, the owner of the property can appeal to the district court for a judicial determination of his liability. This is sufficient. If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a quasi judicial character, or before a tribunal provided by the state for the purpose of determining such questions, due process of law is not denied. It was held by this court in *Pittsburgh etc. Ry. Co. v. Backus*, 154 U. S. 421, 426, 14 Sup. Ct. Rep. 1114, 38 L. ed. 1031, 1036, that a hearing before judgment, with full opportunity to present the evidence and the arguments which the party deems important, is all that can be adjudged vital: See, also, *King v. Mallins*, 171 U. S. 404, 18 Sup. Ct. Rep. 925, 43 L. ed. 214.

"In the amendment to the petition in this case the land owner states that she had no knowledge whatever that her real estate was being used for the sale of cigarettes until after the assessment was levied, and never consented to the same; that she resides in Illinois and rented the property through an agent, who had had no knowledge himself of the sale of cigarettes upon the premises. There is no allegation, however, that she did not have knowledge within ample time to make application to the board of supervisors for the remission of the tax. If such application had been made, it would have been the duty of the board to take the matter into consideration, and determine whether her want of knowledge would justify the remission of the tax. It is not for us to determine whether the defense be a valid one, since, having the opportunity to make it, she declined to do so.

"The question is made whether section 5007 violates the constitution of Iowa in not stating distinctly the tax and the object to which it is to be applied; but as this is purely a local question, we are not called upon to consider it.

"Affirmed.

"The Chief Justice, Mr. Justice Brewer, and Mr. Justice Peckham dissented."

McMANUS v. HORNADAY.

[124 Iowa, 267, 100 N. W. 33.]

CONSTITUTIONAL LAW—Province of Courts and Legislature.—The legislature has no power to give new life to a cause of action which has been finally adjudicated by a court of competent jurisdiction. (p. 320.)

CONSTITUTIONAL LAW—Curative Statute After Judgment.—Where suit has once been brought against a property owner for recovery of a tax, and it has been duly and finally adjudged that the tax is invalid and that no recovery can be had thereon, no legislative statute subsequently enacted will operate to nullify the effect of judgment, and subject the property owner to another suit upon the same demand. (pp. 321, 322.)

CONSTITUTIONAL LAW—Curing Tax Levy—Reassessment.—A statute authorizing the reassessment of a tax by a city council in case it proves invalid or of doubtful validity, does not authorize an ordinance legalizing an assessment after it has been adjudged invalid by the courts. (p. 322.)

W. J. Roberts, for the appellant.

Hazen I. Sawyer, for the appellee.

363 **WEAVER, J.** Plaintiff states his alleged cause of action in three counts, as follows: 1. It is alleged that the city of Keokuk, acting under its charter powers, caused Orle street to be curbed, guttered and macadamized, and that the cost of the improvement thus made was duly assessed against the property abutting upon said street. It is further alleged that the defendant was at the date of such improvement the owner of a certain lot fronting upon said street, against which lot there was assessed its due proportion of the cost of said improvement, and a certificate for the amount of such tax was issued to the plaintiff. Said certificate is still the property of the plaintiff, and the tax or claim represented by it is due and unpaid, and defendant refuses to pay the same. 2. The second count is in all respects a repetition of the first count, except that the date of the city ordinance under which the improvement was ordered and the date upon which the certificate was issued are left blank. 3. The third count adopts the allegations of the first and second counts, and alleges that "plaintiffs or their privies" furnished the materials, work and labor required for said improvement and that the reasonable value thereof, chargeable to the defendant's property, and payable by him, was one hundred and seventeen dollars and three cents, being

same amount or debt represented by the certificate declared upon the first and second counts.

On these allegations, judgment is demanded against defendant for one hundred and seventeen dollars and three cents, with interest and costs, and for an ~~200~~ order for the sale of defendant's property to satisfy the lien of said special assessment.

For answer the defendant (1) denies the power of the city to cause its streets to be paved, curbed, guttered, or macadamized at the expense of the abutting property, or to make certificates issued for such improvement a lien upon said property, except when such improvement is made in accordance with the duly established grade of the street; denies that the alleged improvements upon Orleans street were made in accordance with the established grade, but that they were in fact laid upon the natural surface, far above such grade; and alleges that said work was done without authority of law, and without defendant's consent or acquiescence. (2) He further alleges that on April 7, 1894, in the superior court of the city of Keokuk, the plaintiff brought a suit against the defendant upon the same certificate now declared upon, resulting in a decree in said court in plaintiff's favor for the recovery of the amount claimed. Thereafter defendant appealed from the decree so entered to this court, where, upon a full hearing on the merits, said decree was reversed, it being held and decided that said special assessment and certificate were void and conferred no right of recovery upon the plaintiff. Said judgment of reversal having been entered, a procedendo was issued from this court to the superior court of Keokuk, and thereupon, on August 3, 1897, the latter court entered final judgment dismissing the plaintiff's bill, and taxing against him the costs of the proceeding. By reason of all these facts it is alleged that the plaintiff's pretended cause of action has been fully and finally adjudicated. Replying to the foregoing answer, the plaintiff admits the bringing of the former suit, the judgment in his favor in the trial court, the reversal of such judgment by this court, and the subsequent judgment dismissing the petition. He next alleges that said reversal and the dismissal of his petition were by reason of "certain irregularities and illegalities" in the ordering of ²⁷⁰ the street improvement, and in adopting a change of the grade of said street and says that thereafter the twenty-sixth general assembly of this state (Acts Twenty-sixth General Assembly, Extra Session, page 35, chapter 28) enacted a statute legalizing the said change of grade, and the acts of the city in improving said street, and i-

levying the tax therefor, and legalizing the certificates issued for said tax. Further replying to said answer, plaintiff avers that on January 14, 1897, the city council of Keokuk adopted an ordinance changing the grade of Orleans street to correspond with the macadamizing, curbing and guttering theretofore made, and "legalizing the orders and proceedings of the city council" in causing said improvements to be made, and in levying the cost thereof upon the abutting property.

To this reply the defendant demurred on the ground that the legalizing act of the twenty-sixth general assembly is unconstitutional and void, that the legalizing ordinance by the city council is also unconstitutional, and cannot have retroactive effect or give life or validity to a tax or certificate already adjudged to be void; and because said enactments are an unauthorized interference with judicial proceedings, and constitute, in effect, an attempt to grant a new trial by special legislation. The demurrer being overruled, and defendant electing to stand the case on, judgment was rendered as demanded by plaintiff, and defendant appeals.

1. Assuming that it was within the power of the legislature by special act to legalize the proceedings of the city council ordering the street improvement, and in assessing the cost thereof against the abutting property, we have then to inquire whether such legalization can have the effect to make the defendant liable upon a claim or cause of action which has been litigated to the court of last resort and determined in his favor? In our judgment, that question must be answered in the negative. While it is competent for the legislature to prescribe remedies and methods of procedure to be ²⁷¹ observed and applied by the courts, it is an elementary proposition of constitutional law that the judicial department of the government is, within its appropriate sphere, entirely independent of legislative interference, and the adjudication of a controversy between litigants having been once accomplished in due form of law, the legislature without power by special act to nullify such adjudication or reopen the controversy for another trial: *Williams v. Registrar*, 3 Tenn. 214; *People v. Saginaw*, 26 Mich. 22; *Sanders v. Cabaniss*, 43 Ala. 173; *Dorsey v. Dorsey*, 37 Md. 64, 11 A. Rep. 528; *Roche v. Waters*, 72 Md. 264, 19 Atl. 535, 7 L. R. 533; *Campbell v. Corry*, 5 Week. Law Bull. 516; *Bates v. Kinsell*, 2 D. Chip. 77; *Young v. State Bank*, 4 Ind. 301, 58 A. 630; *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 11; *Miller v. State*, 8 Gill, 145; *Forster v. Forster*, 15

Mass. 559; Moser v. White, 29 Mich. 59; Baltimore v. Horn, 26 Md. 194; Borealis v. Dobbie, 17 Ohio, 125; Milam v. Bakeman, 54 Tex. 153; Yeatman v. Day, 79 Ky. 186; Gaines v. Catron, 20 Tenn. 514; Peerce v. Kitzmiller, 19 W. Va. 564; Denny v. Mattoon, 2 Allen, 379, 79 Am. Dec. 784. Several of the foregoing cases are quite parallel in facts and circumstances with those now under consideration, while all and many more which might be cited are applicable in principle.

In Moser v. White, 29 Mich. 59, a village council, having authority to levy a tax by resolution or by-law, proceeded to levy the same by parol vote. The plaintiff recovered judgment before a justice of the peace against the village authorities for trespass in seizing and selling his property to pay the tax thus illegally or irregularly levied. This judgment was reversed on certiorari by the circuit court and plaintiff sued out a writ of error to the supreme court. After the judgment was rendered by the justice of the peace, and before the case had been disposed of by the supreme court, the legislature, by special act, attempted to legalize the tax roll and cure all the ²⁷² defects in the proceedings. The defendants sought to take advantage of this act, but the court refused to give it effect, saying: "But plaintiff's judgment was obtained before this act was passed. If regular when obtained, it could not be reversed. The legislature has no authority to reverse judgments, directly or indirectly. The effect of the act must be so limited as not to interfere with an existing judgment, or it would be necessary to declare it void, on principles too elementary to be discussed." The principle here so clearly stated is also discussed with much ability and force by Bigelow, J., in Denny v. Mattoon, 2 Allen, 379, 79 Am. Dec. 784. Speaking of a legislative attempt to give validity to proceedings which the court had already declared void, he says: "The gist of the present inquiry is whether the legislature, by a statute confirming proceedings which this court has adjudged to be void, and declaring that the same shall be taken to be good and valid in law, has the power to impair, set aside, or annul the effect and force of a judgment in its nature final, so that it can no longer be conclusive of the rights of the parties. Such is the effect which the petitioner seeks to give to the statute. It is the sole ground on which the interposition of the court is asked in the present proceeding. The validity of the statute in its application to other cases or proceedings is not now before us. The precise question is whether it can be held to operate so as to confer jurisdiction over parties and p

ceedings which it has been judicially determined did not establish and give validity to acts and processes which have been adjudged void. The statement of this question seems to suggest the obvious and decisive objection to any construction of the statute which would lead to such a conclusion. It would be a direct exercise by the legislature of a power in its nature clearly judicial." Quotations to the same general effect could be made from eminent courts and law-writers almost indefinitely, the correctness of the proposition which they affirm seems clear to require argument or a general marshaling of the authorities.

273 The appellee insists, however, that conceding the rule to be as stated, this case does not come within its terms, but is governed by *Richman v. Supervisors*, 70 Iowa, 627, 26 N. W. 38, *Tuttle v. Polk*, 84 Iowa, 12, 50 N. W. 38, and other precedents of that class. This contention cannot prevail. In the case cited there was a reassessment of the tax, and the action which this court upheld was upon the new demand thus created, for that reason the plea of former adjudication could not be sustained. In *Iowa Sav. etc. Assn. v. Heidt*, 107 Iowa, 297, 190 Am. St. Rep. 197, 77 N. W. 1050, 43 L. R. A. 689, and other precedents of that class which are also cited, the legalizing statutes were applied to cases in which the litigation was still pending and undetermined. No case has been called to our attention, and we think none exist in this country in which the legislature is held to have power to give new life to a cause of action which has been finally adjudicated by a court of competent jurisdiction. The theory of the appellee that the issue in the present case is not identical with the one formerly tried is not sound. In the case brought by the same plaintiff against the same defendant upon the same certificate, and for a recovery of the same tax. The only new element in the case is the legalizing statute, which was enacted after the former adjudication was complete, and therefore, as we have seen, cannot affect the force, validity, or conclusiveness of a judgment already duly rendered. It may well be true where a work of public improvement has been performed, and the tax to provide payment therefor has been adjudged illegal because of some defect in the proceedings not going to the jurisdiction or power of the city to act in the premises, the legislature, by general or special statute, may provide for a reassessment, and the tax thus levied be enforced. In such case no attempt is made to infuse life or validity into the tax which has been adjudged void, nor to enable the city or certificate holder

to recover in a second suit upon the tax found to have been illegally assessed. The new assessment creates a new ²⁷⁴ obligation, wholly independent of the first assessment, and imposes a liability upon the property owner wholly distinct from that which was litigated in the first suit. The judgment in the first suit was not rendered upon any mere plea in abatement, but upon a plea going directly to the right of the city or of the holder of its certificate to any recovery upon the merits, and the final adjudication there reached that this tax was invalid and unenforceable must stand, notwithstanding the legalizing statute.

In the judgment of the writer of this opinion, the decision in *Iowa Sav. etc. Assn. v. Heidt*, 107 Iowa, 297, 70 Am. St. Rep. 197, 77 N. W. 1050, 43 L. R. A. 689, goes to the utmost allowable limit in recognition of the power of the legislature to affect the relations and rights of litigants in pending suits, and the rule there laid down should not be extended; but giving that precedent full force and effect, it falls much short of the proposition which appellee asks us to affirm. In that case the legalizing act eliminating the plea of usury went into effect before the appeal from the judgment below had been submitted to this court, and we, trying the case *de novo*, recognized and gave effect to the legalizing statute. But if the plaintiff therein had first pursued its foreclosure suit to this court, and had here been finally defeated because of the usury in its contract, we think no one would seriously contend that a legalizing act passed after such final adjudication had been reached could restore life to that particular contract, and clothe plaintiff with the right to maintain another suit thereon; and yet, if the appellee's claim in the present case be correct, there is no logical stopping place short of that conclusion—a conclusion utterly destructive of the constitutional barrier which protects the functions and powers of the judiciary from legislative interference.

It is not necessary for us to follow counsel in consideration of the general powers of the legislature to pass legalizing acts, nor as to the effect of such statutes upon rights ²⁷⁵ and claims which have not been finally adjudicated. The question here presented is a much narrower one. It is not a question whether the legislature can cure defects and informalities in the levy of a tax, or authorize the reassessment where a tax has been adjudged invalid. All it is necessary to hold, and all we do hold is that where suit has once been brought against a property owner for the recovery of a tax, and it has been duly and finally ad-

judged that the tax is invalid and that no recovery can be thereon, no legalizing statute subsequently enacted will operate to nullify the effect of that judgment, and subject that property owner to another suit for recovery upon the same demand.

2. The legalizing act upon which appellee relies contained a proviso to the effect that nothing contained therein should be held to affect pending litigation. At that date, as we have said, the former suit between the parties hereto had been decided by this court: *McManus v. Hornaday*, 99 Iowa, 507, 68 N. W. 812. But judgment upon the procedendo issued to the trial court was entered at a later date. There is some discussion in the briefs of counsel whether the former litigation could be considered as still pending at the date of said act, but we think the determination of that point is immaterial. If that suit was still pending, then by its terms the legalizing statute does not apply to this controversy; and if, on the other hand, it was not then pending, but said controversy had been fully and finally adjudicated, then it was beyond the power of the legislature to reopen it for another trial.

3. It would seem hardly necessary to consider the effect of the attempt of the city council to validate a void tax by the enactment of a so-called "legalizing ordinance." If a council may by one ordinance levy an illegal tax, and then, after the same has been so judged void by the courts, proceed by another ordinance to declare its former acts "legal and valid," and thus avoid the effect of the ²⁷⁶ adverse adjudication, then indeed have judicial determinations ceased to be of any force or effect for the protection of the citizen or his property against municipal usurpation. Counsel argue that under the provisions of McClain's Code, sections 834, 835, which were in force at that time, it was competent for the council to enact such an ordinance. The statute referred to provided that when, by reason of any omission or irregularity in proceedings, a special tax or assessment is invalid or of doubtful validity, the council "may take all necessary steps to correct the same and to reassess, and to relevy the same, including the ordering of the work, with the same force and effect as if made at the time provided by law or ordinance relating thereto, and may reassess and relevy the same with the same force and effect as an original levy." It is sufficient to say that the ordinance in this case makes not the slightest attempt to correct or provide for any reassessment or relevy of the tax, but in ordering a change of the grade of the street to correspond to the improvement before made, it enters a sweeping ordi-

that all the steps previously taken in respect to said improvement "be hereby declared legal and valid and of the same force and effect as though done prior to and in relation to the ordering of the curbing, guttering and macadamizing of Orleans street." This is within neither the letter nor spirit of the authority given by the statute, and in no manner affected the right of the defendant to rely upon the adjudication relieving him from liability upon the certificate held by the plaintiff.

For the reasons stated, the judgment of the trial court must be reversed. Final decree may be entered in this court at the option of the defendant, or, if he so elect, the cause will be remanded to the trial court for judgment in accordance with the views here expressed.

A Curative Statute which takes away vested rights is unconstitutional: *McCord v. Sullivan*, 85 Minn. 344, 89 Am. St. Rep. 561; *Koch v. West*, 18 Iowa, 468, 96 Am. St. Rep. 394; *Maguiar v. Henry*, 84 Ky. 1, 4 Am. St. Rep. 182. Thus, a statute legalizing prior acknowledgments of deeds and mortgages taken before an officer who was a stockholder in the grantee corporation can have no effect as against intervening judgment and mortgage liens: *Steger v. Traveling Men's Bldg. Assn.*, 208 Ill. 236, 100 Am. St. Rep. 225. As to the effect of a curative act passed pending a suit, see *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 227. It is said that the tendency of courts is to limit strictly the power to pass curative laws: *Finlayson v. Peterson*, 5 N. Dak. 587, 57 Am. St. Rep. 584.

WHITE v. BROTHERHOOD OF AMERICAN YEOMEN.

[124 Iowa, 293, 99 N. W. 1071.]

INSURANCE—Designation of Wife as Beneficiary.—The statement in a benefit certificate that the beneficiary is related to the insured as wife is descriptive of her relation to him, and does not in itself provide for payment to his widow only. (p. 324.)

INSURANCE—Change in Beneficiary's Relation to Assured.—A policy of life insurance, or a designation of a beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased, unless it is otherwise stipulated in the contract. (p. 325.)

INSURANCE—Divorced Wife as Beneficiary.—A married woman named as beneficiary in a policy of insurance on the life of her husband, is entitled to the proceeds of the policy, notwithstanding a divorce obtained by her before his death. (p. 325.)

The defendant was a mutual benefit association in which A. J. White held a certificate of membership. His then wife was

named as beneficiary. After the certificate was issued she was divorced from White. White married again, but died without changing his beneficiary. His widow, Lillian White, brought action on the certificate, and his former wife intervened. The intervenor's demurrer to the petition was overruled, and the appellee's demurrer to the petition of intervention was sustained. The intervenor appealed.

E. E. Blanchard, for the appellant.

A. F. Brown, for the appellee.

204 SHERWIN, J. As will be noticed from the facts stated, the contest is between the widow, Lillian White, and the divorced wife, who is the beneficiary named in the certificate, and who was at the time it was issued the wife of A. J. White.

The undertaking of the contract was to pay the sum therein named to Florence H. White, related to the member as wife. Section 1824 of the Code provides as follows: "No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the beneficiary under said certificate shall be the husband, wife, relation, legal representative, heir or legatee of such member." One of the expressed objects of the defendant association was to bestow substantial financial benefits "upon . . . the family, widow, heirs, blood relation, and such others as may be permitted by the laws of the state wherein this brotherhood shall operate," and its constitution and by-laws permitted a change of beneficiaries upon certain conditions. When the certificate was issued the appellant was the wife of A. J. White, and was one of the class of persons designated by the statute and by the laws of the order as a competent beneficiary. The statement that she was related to the member as wife was descriptive of her relation to him, and did not in itself provide for payment to his widow only: *Overhiser v. Overhiser*, 63 Ohio St. 77, 81 Am. St. Rep. 612, 57 N. E. 965, 50 L. R. A. 552; *Courtois v. Grand Lodge A. O. U. W.*, 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. 970.

The statute provides only for the relationship that shall exist when the certificate is issued, and does not in words, or by fair implication, limit payment to those only who occupy **205** such relation at the time of death. It was the evident intent of the legislature to prohibit anything in the nature of

gambling contracts, and to so limit the beneficiaries as to accomplish such a result. Under the statute and under the laws of the order the member's legatee may be his beneficiary, and this without reference to who the legatee may be. A person may will his property as he pleases, and it is therefore evident that the statute was not intended to limit beneficiaries to those for whom the law would provide in the absence of a last will and testament. When the certificate was issued, the beneficiary, being one of the class named by the statute and by the laws of the order, it created a valid contract with the member, agreeing to pay the sum therein named to the named beneficiary. True, the member had the right to change his beneficiary, but he did not do so, nor attempt to do so, and we see no reason why we should change the contract and deprive the appellant of the provision which was thus made for her. It is a well-recognized rule "that a policy of life insurance or a designation of a beneficiary, valid in its inception, remains so although the insurable interest or relationship of the beneficiary has ceased, unless it is otherwise stipulated in the contract": Bacon on Benefit Societies, sec. 253; Connecticut Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251.

This rule has been held not to obtain, however, where the beneficiaries are restricted to the family, relations, or dependents, as was the case in Tyler v. Odd Fellows' Mut. etc. Assn., 145 Mass. 134, 13 N. E. 360, relied upon by the appellee. There it was stipulated that payment should be made to the person designated by the member, "provided such person was an heir or member of decedent's family." This limitation was held to be controlling, and the wife, who was named as beneficiary and had been divorced, not being an heir or member of the family of the deceased at the time of his death, was held incompetent as a beneficiary, and recovery ²⁰⁶ was for that reason alone denied. Had the certificate before us been in terms payable to the wife or to the widow of the deceased, we think a divorce would have excluded the then wife, because of the absence of such relationship at the time of death; but we have an entirely different case to deal with. It is also worthy of notice that Mr. White made no effort to change his beneficiary, although he had the right to do so, and knew that his former wife was expressly named as his beneficiary in the certificate. A married woman named as beneficiary, in a policy of insurance on the life of her husband, is entitled to the proceeds of the policy, notwithstanding a divorce obtained by her before his death: Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Overhiser v.

Overhiser, 63 Ohio St. 77, 81 Am. St. Rep. 612, 57 N. E. 50 L. R. A. 552; *Courtois v. Grand Lodge*, 135 Cal. 552, 17 Am. St. Rep. 137, 67 Pac. 970; *McGrew v. Mutual Life Co.*, 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Bacon on Beneficial Societies*, supra.

We reach the conclusion that the demurrers were wrongfully sustained and the judgment is reversed.

If a Married Woman is named as beneficiary in a benefit certificate or policy of insurance on the life of her husband, she is entitled to the proceeds thereof, notwithstanding their marital relations are terminated by divorce prior to his death: *Courtois v. Grand Lodge U. W.*, 135 Cal. 552, 87 Am. St. Rep. 137; *Overhiser v. Overhiser*, 63 Ohio St. 77, 81 Am. St. Rep. 612. Compare the note to *Lake v. Lake*, 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Bacon on Beneficial Societies*, supra.

CROOKS v. JENKINS.

[124 Iowa, 317, 100 N. W. 82.]

MORTGAGES—Priority of Liens.—Where a deed is executed to secure an existing indebtedness from the grantor to the grantee, and subsequently the grantor executes a mortgage to secure a debt to another, an agreement thereafter made that the deed shall secure the obligations incurred after the execution of the mortgage, does not give the lien of the grantee priority, as to the after-acquired indebtedness, over the lien of the mortgagee. (p. 328.)

NOTICE—Possession of Land.—A mortgagee of real estate takes his security charged with notice of the equities of a third person in possession of the property, at the time of the execution of the mortgage. (p. 328.)

NOTICE.—The Possession of Land by a Tenant or lessee.—It is not sufficient notice of all his rights and interests connected with or growing out of the tenancy itself or the lease, but is also notice of all interests acquired by collateral or subsequent agreements. (pp. 329, 330.)

Action to foreclose a mortgage given by Mrs. W. T. Jenkins and husband to the plaintiff, October 29, 1897, to secure a loan of seven hundred and seventy-five dollars, dated July 13, 1897, and due December 13, 1897. The mortgage was recorded the day following its execution. In April, 1897, she and her husband conveyed the mortgaged property to William Patterson, the deed was not recorded until January, 1899. He had been a tenant of one Tascott, from whom Mrs. Jenkins purchased the property and he continued in possession as her lessee. Patterson

tended that the deed was given to secure what Jenkins owed him and might become indebted to him in the future. A decree was rendered against the Jenkinses by default; and on a trial of the issues between the plaintiff and Patterson, a decree was entered establishing the claim of Patterson to the amount of seven hundred and forty-two dollars as a lien superior to the plaintiff's mortgage. Plaintiff appealed.

Bowen & Brockett, for the appellant.

Berryhill & Henry, for the appellees.

³¹⁸ LADD, J. Patterson was in occupancy of the land in controversy as a tenant when Mrs. Jenkins, his daughter, purchased it, and thereafter paid rent to her until she conveyed the property to him in April, 1897. After receiving the deed, he paid the interest on two mortgages on the property—one of one thousand dollars and another of two hundred dollars—and also the taxes, but no rent, save as these items were to be so applied. This deed was mailed to Patterson by Mrs. Jenkins from Boone, and in a few days was followed by a letter from her stating, in the words of Mrs. Patterson, that “she had sent us this deed and security for what they owed us—what we would pay on the place. This letter was to tell us this deed was for security for what we was putting in the place.” At the close she said, “Put away this letter for no one knows what may turn up.” On cross-examination she declared that the letter said, “We have sent you a deed to secure your interest and what we owe you in the place,” and that “this was word for word what was in the letter.” Notwithstanding the admonition to preserve it, the communication was lost. Mrs. Jenkins, who wrote it, testified that it advised her father and mother “they could hold that for the seventy-five dollars. We didn’t owe them any more money. . . . I never said anything to them at any time about holding it for any other money. . . . I had said in the letter the deed would be security for the seventy-five dollars. I never changed that agreement.” No one else pretends to state the contents of the letter, and, from what we have set out, it is apparent that the object disclosed was to secure an existing indebtedness. True, the subsequent conversations between the parties tended to enlarge the debt to be secured by the deed, but all these ³¹⁹ occurred after plaintiff’s mortgage had been executed and recorded. The indebtedness was then but seventy-five dollars, and, in making an agreement thereafter, if

any there was, with respect to future advances for interest taxes, the parties were charged with notice of this mortgage, such payments made subject thereto. In other words, the of plaintiff's mortgage attached to Mrs. Jenkins' equitable subject to existing encumbrances, but not to any that the party by contract, oral or written, might thereafter choose to create.

2. Prior to taking the mortgage, the plaintiff, with Jenkins examined the property, and testified that while there he Patterson, and that the latter, upon inquiry, declared "he only a tenant there, and had no interest; that the property belonged to his daughter." Jenkins claims to have gone into the house, and upon his return to have asked Crooks if he found out who owned the place, when Patterson said he had informed Crooks that he had no interest there, save to pay. On the other hand, Patterson denied having any talk with the and Mrs. Patterson swore that when they were there her husband was away. She further explained that Jenkins came to the house and inquired if the deed had been recorded, and, upon being informed that it had not, left with plaintiff, whom she did not meet. Jenkins concealed from the latter the execution of the deed, because, as he explains, it was none of his business. The record suggests no motive on the part of Patterson for falsely representing that he had no other interest in the premises than as tenant, and we are inclined to concur with the court in its conclusion that he did not do so.

3. The plaintiff took the mortgage without notice of the same to Patterson, other than the possession of the premises afforded by him. The doctrine that a purchaser of real estate—and a mortgagee—has been held to be such—takes the same charged with notice of the equities of a person, other than the vendor, in possession at the time of the purchase, is not questioned: *O'Neill v. Cox*, 320 115 Iowa, 15, 87 N. W. 742. But like other general rules, this has its exceptions. Thus, when possession is inconsistent with the record title, it is presumed to be under the record title, and is not notice of outstanding, unrecorded equities. *Rogers v. Hussey*, 36 Iowa, 664; *Brown v. Wade*, 42 Iowa, 166; *Bonnell v. Allerton*, 51 Iowa, 166, 49 N. W. 857; *May v. Stewart*, 75 Iowa, 116, 9 Am. St. Rep. 463, 39 N. W. 221. The plaintiff is on the ground that, having given notice to the world of his estate in land by a proper record of a conveyance to himself, a possession justified by said recorded title is to be presumed to have been under such title, and is not notice of any other title which he may have subsequently acquired, but which, through

neglect, he has failed to record: *Dutton v. McReynolds*, 31 Minn. 66, 16 N. W. 468. So, too, where a vendor remains in possession after a conveyance, such possession, unless long continued, is not notice to subsequent purchasers of any rights reserved inconsistent with his conveyance: *Sprague v. White*, 73 Iowa, 670, 35 N. W. 751; *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. 243. Such possession is to be presumed to be continued by the sufferance of the purchaser. Appellant contends that there is still another exception, to the effect that possession begun under one kind of right is not notice of another or different interest subsequently obtained by the occupant, unless circumstances direct the purchaser's attention to the change of title, and thereby operate as actual notice. The authorities ordinarily cited by text-writers cannot be said to sustain this proposition. In *Smith v. Miller*, 63 Tex. 72, Miller appears to have been in possession by contract of purchase from the owner, Collins. The latter subsequently conveyed the land to Whitsell, of whom Miller leased it, and subsequently leased it of Whitsell's grantee, Mrs. Smith, against whom Miller afterward attempted to plead the contract of purchase first mentioned; and it was held that he had by his own acts divested his possession of those attributes which would cause it to put purchasers upon inquiry. By becoming tenant of Whitsell and Mrs. Smith, he renounced his claim to the land as purchaser. The syllabus to the case is not in accord with the decision. ²³¹ All that was decided in *Bush v. Golden*, 17 Conn. 594, was that possession of a way across a dam by tenants in common was not notice of any special reservation or right in either, as against a mortgagee of the entire tract. The point involved in *Kendall v. Lawrence*, 23 Pick. 540, was the sufficiency of the evidence of possession. In *Dawson v. Danbury Bank*, 15 Mich. 489, the principle as to the continued possession of a vendor after his conveyance was applied to a sale and deed under a decree of foreclosure of a mortgage executed by him. In *Williams v. Sprigg*, 6 Ohio St. 585, the acts of possession by the tenant were held insufficient to put a purchaser on inquiry. In *Red River Valley etc. Co. v. Smith*, 7 N. Dak. 236, 74 N. W. 194, an excerpt from *Leach v. Ansbacher*, 55 Pa. St. 85, to the effect that where a party in possession holds a lease, and a purchaser knows it, he may attribute the possession to the lease, and the possession is not constructive notice to him of outstanding equities, was quoted, with apparent approval; but in *Anderson v. Brinser*, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205, the expression is dis-

approved, and declared not to have been essential to a decision of Leach's case. Indeed, we have discovered no case holding that the notice charged by the possession of a tenant is limited to rights incident to his tenancy.

On the contrary, the doctrine has long prevailed in England that the possession of a tenant or lessee is not only notice of his rights and interests connected with or growing out of the tenancy itself or the lease, but is also notice of all interests required by collateral or subsequent agreements: *Daniels v. Dutton*, 16 Ves. 249. The same rule has been approved by several courts in this country: *Anderson v. Brinser*, 129 Pa. St. 376; *Atl.* 809, 18 *Atl. Rep.* 520, 6 L. R. A. 205; *Coari v. Olsen*, 111 *Ill.* 273; *Buck v. Holloway's Devisees*, 2 J. J. Marsh. 180; *Marshall v. Noble*, 40 Me. 481; *Davis v. Briscoe*, 81 Mo. 37; 23 *Am. Eng. Ency. of Law*, 500. In a note in section 616 of his work on Equity Jurisprudence, Mr. Pomeroy declares ³²² that in his opinion, "these decisions are much more in harmony with the general doctrine than those others which have speculated and drawn fine distinctions upon the amount of notice derived from the occupant's original right to the possession. The reasons upon which the whole doctrine rests seem to be conclusive. If the possession of a third person is said to put a purchaser upon inquiry, and he is charged with notice of all that he might have learned by a due and reasonable inquiry of the occupant with respect to every ground, source, and right of his possession. Anything short of this would fail to be reasonable and due inquiry." Patterson and his wife were occupying the property in controversy as a home, and Crooks had no personal knowledge of whether they entered as tenants or otherwise. Instead of inquiring of them, he relied on information from Jenkins, and refrained from telling him of the execution of the deed. Would they to be bound by the partial statement of one interested in suppressing the truth? Certainly, the history of their occupation ought to have no bearing on this question. They were in possession, and the more reasonable and just rule is that, instead of stopping when the fact that they had been tenants was ascertained, the plaintiff should have made full inquiry, and, not having done so, he is charged with knowledge of such facts as interrogation of the occupants in all probability would have disclosed. In other words, possession puts everyone upon inquiry as to present conditions, and, unless this is obviated by acts of the occupant explaining such possession, as by recording the deed or lease, or by repelling the inference of any claim

by a conveyance to another, all are conclusively presumed to have such information concerning his present possession as reasonable inquiry would have procured.

4. Our conclusion is that plaintiff took his mortgage charged with notice of the deed to Patterson, and that this deed was executed for the purpose of securing the payment of seventy-five dollars, with interest. Whether, as between Mrs. Jenkins and ³²³ Patterson, the deed should be regarded as security for subsequent advances, we have no occasion to determine.

Some question is raised as to whether the court had jurisdiction to determine the amount due Patterson from Mrs. Jenkins, in the absence of notice to her of the filing of his cross-petition. Had not the issue been presented by the petition, there might be some force in the suggestion. The plaintiff demanded that, if Patterson's interest be found superior to the mortgage, the latter be declared to hold the deed as trustee to secure the payment of a small sum of money, and prayed that all defendants be required to interplead "for the purpose of determining their rights and liabilities between themselves." The answer of Patterson put these matters in issue, and his cross-petition may as well be eliminated. Mrs. Jenkins, by defaulting, could not deprive the court of jurisdiction to adjudicate the very issues raised by the petition, among which was the liability which the deed was executed to secure.

Modified and affirmed.

EFFECT OF THE POSSESSION OF REAL PROPERTY AS NOTICE.

I. Possession as Notice of Occupant's Rights Generally.

- a. In Case of Real Estate in General.
 1. The General Rule, 332.
 2. Limits and Criticism of the Rule, 333.
- b. In Case of Easements or Licenses.
 1. In General, 333.
 2. Water Rights—Drains and Dams, 333.
 3. Ways and Roads, 334.
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II. Effect of Notice and Duty of Inquiry.

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I. Possession as Notice of Occupant's Rights Generally.

a. In Case of Real Estate in General.

1. The General Rule.—“The earth has been described as that universal manuscript, open to the eyes of all. When therefore a man proposes to buy or deal with realty, his first duty is to read this public manuscript, that is, to look and see who is there upon it, what are his rights there”: *Frame v. Frame*, 32 W. Va. 463, 478, 100 E. 907, 5 L. R. A. 245, per Justice Green. Or, more prosaically speaking, possession of real property under a claim of title is sufficient notice of such claim to put others on inquiry as to the existence, nature of the claim, and to charge them with knowledge of all facts which a reasonable inquiry would bring to light: *Tate v. Pensacola Gulf etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 South. 542; *Carpenter v. Carpenter*, 166 Ill. 108, 57 Am. St. Rep. 119, 47 N. E. 721; *Baker v. Baker*, 31 Ind. App. 664, 69 N. E. 182; *Phoenix Mut. Life*

Ca. v. Beaman, 5 Kan. App. 772, 48 Pac. 1007; *Draper v. Taylor*, 58 Neb. 787, 79 N. W. 709; *Ambrose v. Huntington*, 34 Or. 484, 56 Pac. 513; *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 413; *Lowther v. Miller-Sibley Co.*, 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 435.

2. *Limits and Criticism of the Rule.*—This, however, “is not universally true; the notice is merely an inference; it may not arise in some cases; it may be repelled in others; and in others it may be restricted to some particular title or claim. The rule, like all rules of circumstantial evidence, must be governed by the particular circumstances of each case, and have a reasonable operation”: *Cook v. Travis*, 22 Barb. 338, 359.

Indeed, “the doctrine of constructive notice,” observes Justice Campbell in *Allen v. Cadwell*, 55 Mich. 8, 20 N. W. 692, “has been carried so far as to work fraud nearly as often as it prevents it. The fact of possession can be known only to those who see the property they purchase, and the policy of our laws, which make the registry presumably correct, is not very consistent with the extreme application of the other rule.” And, says Justice Beasley, in *Lathrop v. Groton Sav. Bank*, 31 N. J. Eq. 273, 285, “it may reasonably be questioned whether, in many cases, the rule that the possession of lands being in a stranger to the documentary and record title makes it unsafe to trust to such title with implicitness, has not been pushed to an extreme so as to produce inequitable results; and it certainly seems necessary, if the rule is to retain a leaven of justice, to annex to it the qualification that the occupier of the property should be required to refrain from doing anything having an illusive tendency with respect to ownership.”

b. In Case of Easements or Licenses.

1. *In General.*—The possession of land is constructive notice to a purchaser of the servient estate of an easement claimed by the occupant, or even of a license if it would be inequitable to deprive him of it: *Ashelford v. Willis*, 194 Ill. 492, 62 N. E. 817. And the occupation of an easement in land adjacent, which has been conveyed without reservation, being inconsistent with the grant, is held to be notice to a purchaser from the grantee, of a parol reservation of the easement: *Randall v. Silverthorn*, 4 Pa. St. 173.

2. *Water Rights—Drains and Dams.*—A conveyance of land in which an easement is claimed by a third person, who holds adversely in assertion of his right, as the right to dig and use a ditch through the land, is unenforceable as against him: *Franklin v. Pellard Mill Co.*, 88 Ala. 318, 6 South. 685. So, to the grantee of land which is overflowed by a milldam, the existing condition of things may be notice of the equity: *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370, approved in *Simmons v. Morehouse*, 88 Ind. 391, 395. See, however, *Boyn-ton v. Rees*, 25 Mass. (8 Pick.) 329, 19 Am. Dec. 326.

3. Ways and Roads.—The possession of a way by one claimant under a grant is constructive notice of his rights to a purchaser of the servient estate: *Ashelford v. Willis*, 194 Ill. 492, 62 N. E. 158. See, too, *Atlantic City v. New Auditorium Pier Co.* (N. J. L.), 59 N. E. 158. But it is held that the use as a passway of an uninclosed alley in a city by an adjoining lot owner is not notice to the world that the owner claims an exclusive title to the alley, when it is so situated that the occupants of other adjacent lots may also use it: *Gordon v. Sizemore*, 108 Miss. 805.

Where a railway crosses a farm, and the owner of the farm leaves two openings under the road as passageways to and from the different parts of his farm, and builds his fences so as to leave the ways open for use, a subsequent purchaser of the railway is put upon inquiry as to the farmer's rights: *Rock Island etc. Ry. Co. v. Dimick*, 191 Ill. 628, 32 N. E. 291, 19 L. R. A. 105.

4. Railroad Right of Way.—The possession by a railroad company of a right of way across land is constructive notice of its rights to subsequent purchasers of the land: *Illinois Southern Ry. Co. v. Henderson*, 201 Ill. 459, 66 N. E. 382; *Paul v. Connersville etc. R. R. Co.*, 110 Ind. 527; *Campbell v. Indianapolis etc. R. R. Co.*, 110 Ind. 490, 11 N. E. 482. This rule applies where the railroad company is entitled to a deed of the right of way, but none has yet been executed, or, if executed, has not been recorded: *Chicago etc. R. R. Co. v. Hay*, 113 Ill. 493, 10 N. E. 29; *Indiana etc. Ry. Co. v. McBroom*, 114 Ind. 198, 1 N. E. 831; *Day v. Atlantic etc. R. R. Co.*, 41 Ohio St. 392.

The staking out of its line by a railroad company across a village lot, and the digging of holes for fence posts, and the setting up of some of the posts, is held not such possession of its right of way as to put the company as to put an intending mortgagee of the lot on inquiry as to its rights: *Merritt v. Northern R. R. Co.*, 12 Barb. 605. The fact that a railroad commences grading, which subsequently it abandons, is not constructive notice to a purchaser of the land of the company's right, the grading not indicating the purpose for which it was made: *Masterson v. West End R. R. Co.*, 5 Mo. App. 64. Where, however, the owner of land has granted to a railroad the right to cut a channel through his land, and while the work is under way conveys the land, his grantee is put upon inquiry: *Cook v. Chicago etc. R. R. Co.*, 40 Iowa, 451.

The possession by an elevated railroad company of all rights required by or released to it by an abutting owner's unrecorded lease of easements taken or affected, and of causes of action arising from the operation of the road in front of the premises, is constructive notice to a purchaser of the premises of the company's right inconsistent with easements of light, air, and access afforded to the property by the street: *Ward v. Metropolitan Elevated R. R. Co.*, 100 N. Y. 39, 46 N. E. 319.

But where, with the consent of the abutting owner, a railway company has laid a single track in the street, and is operating it, while a grantee of such owner will take with notice of the company to maintain such track, he will not be chargeable with notice of its right, under an unrecorded deed from his grantor, to lay additional tracks in the street: *Varwig v. Cleveland etc. R. R. Co.*, 54 Ohio St. 455, 44 N. E. 92.

II. Effect of Notice and Duty of Inquiry.

a. **Notice of Rights and Claims.**—The possession of land is constructive notice of every title, legal or equitable, under which the occupant claims, and of all facts which may be learned by due inquiry: *Killey v. Wilson*, 33 Cal. 690; *Reeves v. Ayers*, 38 Ill. 418; *Duval v. Wilmer*, 88 Md. 66, 41 Atl. 122; *McCulloch v. Cowher*, 5 Watts & S. 427; *Kuteman v. Carroll* (Tex. Civ. App.), 80 S. W. 842; *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. Rep. 349, 40 L. ed. 463. But notice by possession never extends beyond the rights of the occupant and of those under whom he claims: *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. 905. See, too, *Munn v. Burges*, 70 Ill. 604; *Suiter v. Turner*, 10 Iowa, 517; *Johnson v. Strong*, 65 Hun, 470, 20 N. Y. Supp. 392. And it is said that when a particular claim is notorious and sufficient to account for a possession, no one is called on to speculate as to the existence of some other claim: *Lincoln v. Thompson*, 75 Mo. 613, 629. As to whether possession is equivalent to registry, see "Unrecorded Instruments," post, p. 345.

b. **Inquiry as to Rights and Claims.**—Possession is, *prima facie*, notice of the occupant's title. But this presumption, like that arising from any other fact putting one upon inquiry, is subject to rebuttal by proof showing that an inquiry, duly and reasonably made, failed to disclose any legal or equitable title in the occupant: *Betts v. Letcher*, 1 S. Dak. 182, 46 N. W. 193. See, too, *Stevenson v. Campbell*, 185 Ill. 527, 57 N. E. 414; *Brown v. Anderson*, 17 Ky. (1 T. B. Mon.) 198; *Rogers v. Jones*, 8 N. H. 264.

It has been thought that possession has no effect in determining what the inquiry shall be, or of whom it shall be made: *Eylar v. Eylar*, 60 Tex. 315; *Hickman v. Hoffman*, 11 Tex. Civ. App. 605, 33 S. W. 257. It would seem clear, however, that the inquiry must ordinarily be made of the person in possession: *Canfield v. Hard*, 58 Vt. 217, 2 Atl. 136.

Moreover, it seems that inquiry need be made only of the occupant; and if he disclaims any right or title in the property, when inquiry is made of him, his response is binding upon him and persons claiming under him. He cannot thereafter be heard to assert a claim as against one who has relied upon his disclaimer: *Cavin v. Middleton*, 63 Iowa, 618, 19 N. W. 805; *Trumpower v. Marcey*, 92 Mich. 529, 52 N. W. 999; *Losey v. Simpson*, 11 N. J. Eq. 246, 255. Indeed, the

occupant should refrain from doing anything having an illusive tendency with respect to ownership: *Lathrop v. Groton Sav. Bank*, 3 J. Eq. 273, 285.

III. Knowledge of Possession or Occupancy.

a. **Whether Necessary in Order to Charge with Notice.**—The possession of land, in order to impart constructive notice, need not be actually known to the person sought to be charged with such notice. Purchasers, or other persons dealing with reference to real estate, the possession of a third person, are chargeable with notice of the occupant's rights, notwithstanding they are, in fact, ignorant of the occupancy or possession: *Tate v. Pensacola Gulf etc. Co.*, 37 Ala. 439, 53 Am. St. Rep. 251, 20 South. 542; *Moreland v. Lemaster*, Blackf. 383; *Wolf v. Zabel*, 44 Minn. 90, 46 N. W. 81; *Ranne Hardy*, 43 Ohio St. 157, 1 N. E. 523; *Sheorn v. Robinson*, 22 S. C. 32. "It is not necessary," to quote from *Hodge v. Amerman*, 4 J. Eq. 99, 2 Atl. 257, "in order to establish the fact of notice in such cases, to show that the person to be affected by the notice knew of the possession of the other. If the possession of the other is of the character required by the law—if his possession has the notoriety, certainty, and exclusiveness which the law says shall constitute constructive notice—then notice is a legal deduction from the fact of possession, and all persons dealing with the title to the land in his possession are chargeable with notice of his possession, whether they have actual knowledge of his possession or not. The reason of the rule is that it is the duty of a person, who proposes to deal respecting real estate title to a particular tract of land, to ascertain, in advance, who is in possession of it, and by what right he claims to hold it; and if he neglects this duty, it is only just that he should be charged with the knowledge that he would have obtained had he performed it.

This doctrine, however, has not passed unchallenged. Thus Justice Campbell, in *Allen v. Cadwell*, 55 Mich. 8, 20 N. W. 692, makes the following observation: "The doctrine of constructive notice has been carried so far as to work fraud nearly as often as it prevents it. The fact that possession can be known only to those who see the property they purchase, and the policy of our laws, which make registry presumable correct, and the almost universal practice of purchasing from the registry, is not very consistent with the extreme application of the other rule. To make possession constructive notice to a person who is ignorant of it, concerning claims which can be known only by inquiry, is adding construction to construction, and makes it unsafe for anyone at a distance to deal in lands at all. I am not prepared to say that we have not gone far enough to do this, where the possessory rights arise under a legal title. But to hold that notice of such claims can be held by mere construction, when the legal title originates subsequently, is, I think, unwarranted by either principle or recognized authority." See, also, the able dissenting opinion of Justice Liver in *Sheorn v. Robinson*, 22 S. C. 32, 41.

b. Nonresident Purchasers.—A purchaser who lives in another state is, notwithstanding that fact, bound by the doctrine of constructive notice, and put upon inquiry as to the rights of a third person in possession of the land at the time of its conveyance: *Edwards v. Thompson*, 71 N. C. 177.

IV. Sufficiency, Character, and Extent of Possession.

a. General Essentials of Possession.—Possession of land under a claim of title puts others on inquiry as to the nature and extent of the claim, and charges them with notice of such facts as they could learn by inquiry: *Partridge v. McKinney*, 10 Cal. 181; *Rupert v. Mark*, 15 Ill. 540; *Cabeen v. Breckenridge*, 48 Ill. 91; *Greer v. Higgins*, 20 Kan. 420; *Kansas City Inv. Co. v. Fulton*, 4 Kan. App. 115, 46 Pac. 183; *Tankard v. Tankard*, 79 N. C. 54. But possession, in order to have this effect, must be actual, open, visible, notorious, unequivocal, and exclusive: *Taylor v. Central Pac. R. R. Co.*, 67 Cal. 615, 8 Pac. 436; *Gray v. Lamb*, 207 Ill. 258, 69 N. E. 794; *Stanford v. Weeks*, 28 Kan. 319, 5 Am. St. Rep. 748, 16 Pac. 645; *Bell v. Twilight*, 22 N. H. 500; *Helmes v. Stout*, 10 N. J. Eq. 419; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *Meehan v. Williams*, 48 Pa. St. 238. Moreover, it must be under a claim hostile to the title acquired by the person sought to be charged with notice: *McNeil v. Polk*, 57 Cal. 323. See, too, *New York etc. Trust Co. v. Cutler*, 3 Sand. Ch. 176.

"The character of the possession, which is sufficient to put a person on inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have a title upon record, is very well established by an unbroken current of authority. The possession must be actual, open, and visible; it must not be equivocal, occasional, or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by the record": *Pope v. Allen*, 90 N. Y. 298.

b. Necessity of Residence on the Land.—Possession, in order to impart notice, need not be by actual residence on the land; but where there is no actual *pedis possessio*, dominion must be manifested by such open and notorious acts of ownership as will naturally be observed by others, and the acts must be of a character so certain and definite in denoting ownership as not likely to be misunderstood or misconstrued: *Hodge v. Amerman*, 40 N. J. Eq. 104, 2 Atl. 257. See, also, "Adjoining Property," "Unimproved Land," and "Fencing and Inclosing Land," post.

a. Possession Consistent with Record Title.—The rule is pretty generally recognized that, in order to make possession of land notice of the occupant's right, it must be inconsistent with the record title. If the possession is consistent with the record title, it is presumed to be under such title, rather than under some unrecorded right or title: *Schumacher v. Truman*, 134 Cal. 430, 66 Pac. 591; *Aden v.*

Vallejo, 139 Cal. 165, 72 Pac. 905; Dutton v. McReynolds, 31 Minn. 16 N. W. 468; Staples v. Fenton, 5 Hun, 172; Lance v. Gorman, Pa. St. 200, 20 Am. St. Rep. 914, 20 Atl. 792; Martin v. Thomas (Va.), 49 S. E. 118; Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Rep. 349, 40 L. ed. 463. Thus, it is held that the possession of land by a partnership is not notice to purchasers that the property is partnership assets, if the record title shows the partners to be tenants in common. Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321. For further illustrations, see "Tenants in Common," post.

This doctrine, however, does not prevail in all the commonwealths. Thus, in *Collum v. Sanger* (Tex. Civ. App.), 82 S. W. 459, the court says: "In the recent case of *Ramirez v. Smith*, 94 Tex. 184, 59 S. W. 258, it was expressly stated as a general rule that the fact that the possession of one holding land is consistent with the recorded title does not exempt a purchaser from the duty of inquiring of him of any other title. We think it a safe and salutary rule to require of a prospective purchaser of land to ascertain whether any one is in occupancy of it; and, if there be such possession, to go to the possessor and ascertain the nature and extent of his claim. Possession is evidence of title; and it seems to us that common prudence and common honesty demand this course. If so, the possession should be notice to him; and, if notice to a purchaser, it is notice to a creditor." To the same effect see *Toland v. Corey*, 6 Utah, 392, 24 P. 190.

d. Possession After Change in Occupant's Title.—Some authorities maintain that the continuation of a present possession, after a new title is acquired, is not notice of the title acquired. And probably under some circumstances this is the law: See *Matthews v. Demer*, 22 Me. 312; *Rogers v. Jones*, 8 N. H. 264; *Emmons v. Murray*, 16 H. 385. A different view, however, is taken in *Carr v. Brennan*, 111 Ill. 108, 57 Am. St. Rep. 119, 47 N. E. 721, where the contention was made that possession, to take the place and answer the purpose of the recording of a deed, must be possession taken under the recorded conveyance, and not a mere continuation of the present possession. But this contention did not meet the approval of the court. See, further, "Tenants in Common," post.

This leads up to the contention made in the principal case, ante, 329, that possession begun under one kind of right is not notice of another or different interest subsequently obtained by the occupant, unless circumstances direct the purchaser's attention to the change of title and thereby operate as actual notice. But the court refused to accept this as a correct expression of the law. And in a number of cases it has been decided that where a tenant changes his character by purchasing or agreeing to purchase, his possession amounts to notice of his equitable title as purchaser: See *Coari v. Olsen*, 91 Neb. 273; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360; *Smith & Co.*

James, 22 Tex. Civ. App. 154, 54 S. W. 41. Compare *Vaughn v. Tracy*, 25 Mo. 318, 69 Am. Dec. 471; and see *McRae v. McMinn*, 17 Fla. 876. Or, as is stated in the principal case, the possession of a tenant or lessee is not only notice of all his rights and interests growing out of the tenancy or lease itself, but it is also notice of all interests acquired by collateral or subsequent agreements: See, also, "Tenant or Lessee," post. A question closely related to this—the continued possession of a vendor after making a conveyance of the premises—will be given consideration in a subsequent part of this note.

a. **Abandoned or Terminated Possession.**—If the possession of land has been abandoned for several years, it will not ordinarily put purchasers and others on inquiry: *Bost v. Setzer*, 87 N. C. 187. See, too, *Sanford v. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748, 16 Pac. 465. A purchaser of land, if the record shows a good title, is not bound to look beyond the record to a former occupancy of the premises under a deed of which he has no notice: *Hiller v. Jones*, 66 Miss. 636, 6 South. 465. And where one occupies and cultivates a piece of land for several years after the former occupant has left the vicinity and stayed away, this puts a purchaser from the former occupant on inquiry: *Richards v. Snyder*, 11 Or. 501, 6 Pac. 186.

f. **Part Possession.**—Actual possession of a part of a tract of land is usually considered legal possession of the entire tract covered by the title under which actual possession is taken, so as to put purchasers and others upon inquiry as to the occupant's rights: *Watson v. Mancill*, 76 Ala. 600; *Nolan v. Grant*, 51 Iowa, 519, 1 N. W. 709; *Gale v. Shillock*, 4 Dak. 182, 29 N. W. 661. See, too, *Kent v. Dean*, 128 Ala. 600, 30 South. 543. But where the owner sells a part of his farm, and the vendee takes possession of a part only of the portion sold, the vendor retaining the residue as a part of his farm, the vendee's possession of the part occupied by him is not constructive notice of the extent of his purchase, his deed not being recorded: *Jeffersonville etc. R. R. Co. v. Oyler*, 82 Ind. 394. And where a father, after conveying a tract to his son, repurchases a portion of it, his possession of such portion does not charge a purchaser of the residue from the son with notice of a vendor's lien for the purchase money on the original sale: *Hodges v. Winston*, 94 Ala. 576, 10 South. 535.

g. **Joint Possession.**—Where two persons are in the common or joint possession of property, the legal title being in one, the law refers the possession to the title; and the possession of the other, who has no title, is not notice of any claim he may have. This rule follows from the general principle that possession, in order to amount to notice, must be unambiguous, and not liable to be misconstrued or misunderstood: *Wells v. American Mtg. Co.*, 109 Ala. 430, 20 South. 136; *Atlanta etc. Loan Assn. v. Gilmer*, 128 Fed. 293; *Pope v. Allen*, 80 N. Y. 298. For example, if a vendee and his vendor are both in

possession when the conveyance is made, and there is no change thereafter in the possession, a third person is not chargeable with notice of the deed: *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. 418. And where a grantee enters upon the estate and there continues recording his deed, although the grantor remains on the estate, the grantee and continues his labors thereon as before the conveyance, third persons are not bound to infer that he has a deed of conveyance: *Butler v. Stevens*, 26 Me. 484. See, further, "Tenants in Common" and "Husband and Wife," post.

h. Wrongful Possession.—If a person is a trespasser when he obtains possession, the law seems not to raise a presumption, upon which others may rely for the purpose of breaking the effect of possession as notice of the possessor's rights, that he continues possession as a trespasser: *Ward v. Metropolitan Elevated Ry.* 31 N. Y. Supp. 527, 82 Hun, 545, affirmed in 152 N. Y. 39, 46 N. 319.

1. Erection and Occupancy of Building.

1. Erection of Buildings.—The deposit of building materials upon an otherwise vacant town lot, from which portions of such materials are from time to time hauled away by the owner for use on his buildings being erected or repaired on other lots, the rest remaining with the knowledge and implied consent of the owner of the lot, does not constitute such possession as will impart constructive notice to a purchaser of the lot, of a contract for the sale of the lot between the owner of the lot and the owner of the material: *Hunt v. Lipp*, Neb. 469, 46 N. W. 632. But where a carpenter, employed by the owner of several lots to erect buildings thereon, is let into possession of one of them and of a building thereon to use as a shop, and while so in possession he buys the lot, his possession is constructive notice of his purchase to a subsequent encumbrancer of the lot: *Tillotson v. Mitchell*, 111 Ill. 518. Possession by a person who builds a house on a lot and moves therein puts purchasers and encumbrancers upon inquiry as to his rights: *Harold v. Sumner*, 78 Tex. 581, 14 S. W. 2d 100; *Pride v. Whitefield* (Tex. Civ. App.), 51 S. W. 1100.

2. Occupancy of Buildings.—The occupancy or possession of a house will ordinarily impart constructive notice of the rights of the person in possession: See *Wrede v. Cloud*, 52 Iowa, 371, 3 N. W. 400; *Wright v. Stoneback*, 39 Kan. 170, 17 Pac. 821; *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211. In this last case it is held that the possession of a tenement house by a former tenant who purchases it and removes into the rooms formerly occupied by the vendor, as a housekeeper and collects the rents, is such as to defeat a mortgage executed before the recording of his deed. The fact that one keeps some hardware stored in a cellar under the sidewalk in front of the building, there being nothing to indicate his ownership of the house, does not amount to such possession of the premises as

operate as notice of his equities to a purchaser: *Mack v. McIntosh*, 181 Ill. 633, 54 N. E. 1019. The possession of one of a number of buildings, where they may all be regarded as one establishment, is held not to impart notice in *Billington v. Welsh*, 5 Binn. 129, 6 Am. Dec. 406.

3. **Possession of Schoolhouse or Church.**—Where a lot is conveyed to a school district, and it erects a building thereon and occupies it as a schoolhouse, but the deed is not recorded, a subsequent mortgagee of the vendor, or the assignee of such mortgage, is bound to inquire of the district concerning its rights: *School District v. Taylor*, 19 Kan. 237. To the same effect, see *Everts v. District Township of Rose Grove*, 77 Iowa, 37, 14 Am. St. Rep. 264, 41 N. W. 478. So, the possession of a church by the officers thereof, for the purpose of public worship is as much actual possession as residence on the premises by any citizen, and puts a vendee on inquiry: *Macon v. Sheppard*, 21 Tenn. (2 Humph.) 335.

4. **Occupancy of Rooms or Flat.**—The mere fact that a person lodges and boards on premises, while he works elsewhere, the legal title and the control of the property being in the party boarding him, does not amount to such possession as to impart notice of an equitable interest in the property: *Derrett v. Britton* (Tex. Civ. App.), 80 S. W. 562. And the possession of residence property is presumptively in the daughters, they having the legal title, when they are conducting the house as a boarding-house, and their mother occupies a room therein: *Atlanta etc. Loan Assn. v. Gilmer*, 128 Fed. 293. But the occupancy of rooms in a tenement house by the owner of the building, and his collection of rents, is such possession as imparts constructive notice of his rights: *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211. And the possession of the third flat of a building is constructive notice of the possessor's rights in the entire building and the ground upon which it stands: *Boyer v. Chandler*, 160 Ill. 394, 43 N. E. 805, 32 L. R. A. 113.

5. **Possession of Mining Property.**—The erection of buildings and the commencement of mining on property will put others on inquiry as to the rights of those in possession: *Coffee v. Emigh*, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125. But here, as elsewhere, the possession, in order to constitute constructive notice, must be open, notorious and unequivocal. Occasional entries for the purpose of mining coal are not enough: *Meehan v. Williams*, 48 Pa. St. 238.

6. **Possession of Adjoining Property.**—The use of a vacant town lot, by the owner and his tenants of adjoining premises, as a yard wherein to hang out and dry clothes, does not amount to notice as against a mortgagee: *Williams v. Sprigg*, 6 Ohio St. 585. But the maintenance of a stairway over a vacant lot, as an entrance to the upper part of a building, is notice to a purchaser of the lot of the right of the owner of the building to maintain the stairway: *Jose*

v. Wild, 146 Ind. 249, 45 N. E. 467. Where the owner of a tract of land, unimproved, except for a small clearing, leaves it in charge to the owner of an adjoining tract, who chops wood upon the place and cultivates the clearing, a mortgagee of the holder of the legal title is chargeable with notice of the rights of the equitable owner: *Wickes v. Lake*, 25 Wis. 71.

l. Possession of Unimproved Land.—It has been said that the doctrine of constructive notice arising from the possession of real estate does not apply to unimproved land: *Patten v. Moore*, 32 N. H. 100. This statement, if taken without qualification, is misleading. The use of unimproved or partially improved land for a purpose to which its adoption will impart notice: See *Tate v. Pensacola Gulf etc.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 South. 542; *Rogers v. Turpin*, Iowa, 183, 74 N. W. 925; *Wickes v. Lake*, 25 Wis. 71; *Simmons Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239, 35 L. ed. 1. The breaking up of land with a plow, in view of all who pass along the road, is such possession as imparts notice: *Lyman v. Russell*, Ill. 281.

m. Cutting Wood and Timber.—The occasional cutting of wood under circumstances which might be regarded as so many trespasses is not such evidence of possession as will put others on inquiry: *Holmes v. Stout*, 10 N. J. Eq. 419. See, too, *McMechan v. Griffin*, 20 Mass. (3 Pick.) 149, 15 Am. Dec. 198. However, the cutting of timber on premises by a person, under circumstances indicating ownership thereof, may well apprise persons dealing with reference to the land of such person's rights therein: See *Mason v. Mull*, 145 Ill. 383, 34 N. E. 36; *Nolan v. Grant*, 51 Iowa, 519, 1 N. W. 100; *Wickes v. Lake*, 25 Wis. 71. Persons who enter upon premises, under a grant of the right to enter and remove the standing timber, for the purpose of removing the timber, and who construct logging camps and engage in cutting timber, are in such possession as to constitute notice of their rights to subsequent purchasers of the land: *Bollan v. O'Neal*, 81 Minn. 15, 83 Am. St. Rep. 362, 83 N. W. 471. See, also, *Oconto Co. v. Lundquist*, 119 Mich. 264, 77 N. W. 950.

n. Fencing and Inclosing Land.—The inclosing of land by a fence or otherwise is an important factor in determining whether or not there is such possession as will impart notice of the occupant's rights: See *Havens v. Dale*, 18 Cal. 359. Where the purchaser of land runs furrows around it, this has been held to put a subsequent purchaser on inquiry: *Buck v. Holt*, 74 Iowa, 294, 37 N. W. 377. And where land has been sold, and some of the purchasers have fenced their portions, and are cultivating, and others have built houses on theirs, and are living in them, their possession puts a mortgagee on inquiry: *Brady v. Buckman*, 39 Fed. 243. The inclosing of an adjoining strip of land after purchasing it, presumably by moving the line fence, as to inclose it, is held not to impart notice of the purchaser's rights: *Baker v. Thomas*, 61 Hun, 17, 15 N. Y. Supp. 359. See, also,

over, the following paragraph. But where one purchases a strip of land separated from the main tract of the vendor by a ditch, and takes possession and cultivates it as his own, a subsequent purchaser is chargeable with notice of the equitable title of the occupant: *Bie-mann v. White*, 23 S. C. 490. But see *McMechan v. Griffing*, 20 Mass. (3 Pick.) 149, 15 Am. Dec. 198. And the repairing of fences on unoccupied land is held not to affect others with constructive notice of the rights in the premises of the one making the repairs: *Smith v. Gibson*, 15 Minn. 89. The existence of a fence, unsubstantial and out of repair, around unoccupied land, is held not necessarily to put a purchaser upon inquiry: *Tarrant County etc. Stock Assn. v. Yellowstone Kit*, 10 Tex. Civ. App. 685, 31 S. W. 1080. The possession, in that case, was consistent with the record title of the vendor.

c. **Fencing and Pasturing Land.**—Inclosing a tract of land with other land by a substantial fence, and using the premises for pasturing cattle, is sufficient notice of the rights of a purchaser, holding by an unrecorded contract, to put a subsequent encumbrancer on inquiry: *Millard v. Wegner* (Neb.), 94 N. W. 802. See, also, *Robertson v. Wheeler*, 162 Ill. 566, 44 N. E. 870; *League v. Ventura Stock Co.*, 2 Tex. Civ. App. 448, 21 S. W. 307; *Simmons Creek Coal Co. v. Doran*, 162 U. S. 417, 12 Sup. Ct. Rep. 239, 35 L. ed. 1063. But where land having no buildings upon it is used for pasture by a grantee with others, this is not such exclusive, notorious, and unequivocal possession as to amount to constructive notice of ownership: *Coleman v. Barklew*, 27 N. J. L. 357. In *McMechan v. Griffing*, 20 Mass. (3 Pick.) 149, 15 Am. Dec. 198, it is held that where one in the possession of part of a lot of land purchases the residue (there being no partition fence), and does nothing thereafter but repair the fence around the lot, depasture cattle in it, sell some trees and remove an old hovel, these facts are insufficient to charge a subsequent purchaser with notice.

V. Titles and Instruments Under Which Possession is Held.

a. **Contract of Purchase or Bond for Title.**—The possession of a purchaser under a contract of purchase or under a bond for title is constructive notice of his equities in the premises to others contracting with reference to the property, and charges them with knowledge of such facts as a reasonable inquiry would disclose: *Scheur v. Kelly*, 121 Ala. 323, 26 South. 4; *Georgia State Bldg. etc. Assn. v. Faison*, 114 Ga. 655, 40 S. E. 760; *D'Wolf v. Pratt*, 42 Ill. 198; *Earle v. Peterson*, 67 Ind. 503; *Gouverneur v. Lynch*, 2 Paige, 300; *Falls of Neuse Mfg. Co. v. Hendricks*, 106 N. C. 485, 11 S. E. 568; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Laroe v. Gaunt*, 62 Tex. 481. A mortgage executed by the vendor to a third person after the purchaser has been put in possession under his contract or bond is subordinate to the purchaser's prior equity: *Doolittle v. Cook*, 75 Ill. 354; *Van Boalen*

v. Cotney, 113 Mich. 202, 71 N. W. 491; Jaeger v. Hardy, 48 Ohio 335, 27 N. E. 863; and so is a deed or conveyance: Burr v. Toom 103 Ga. 159, 29 S. E. 692; White v. Patterson, 139 Pa. St. 429, 21 A. 360. Within the foregoing rules, the possession of the tenant or purchaser under a contract of purchase or a bond for title is the possession of his landlord, and puts a subsequent purchaser of the premises upon inquiry: Price v. Bell, 91 Ala. 180, 8 South. 565; Clarke v. Beck, 72 Ga. 127.

Possession under a parol contract of purchase is constructive notice of the possessor's rights: Chicago etc. R. R. Co. v. Boyd, 118 Ill. 7 N. E. 487; Stillings v. Stillings, 67 N. H. 584, 42 Atl. 271; Cunningham v. Brown, 44 Wis. 72. So is possession under an unrecorded contract of purchase: See "Unrecorded Instruments," post.

b. Defectively Executed Deed.—Possession by a vendee under a deed defectively executed puts others upon inquiry concerning rights in the premises (Gilchrist v. Van Dyke, 63 Vt. 75, 21 Atl. 108; Herren v. Strong, 62 Wis. 223, 22 N. W. 408. See, too, Edmondson v. Orr, 20 Miss. (12 Smedes & M.) 541), as where a deed is attested only one witness when the statute requires two: Salvage v. Haydon, 68 N. H. 484, 44 Atl. 696.

c. Deed Misdeshcribing Land.—Possession of a tract of land taken by a grantee under a deed which misdescribes the land or which describes land other than that which was intended to be conveyed puts notice of his rights in the property to those who may subsequently deal with reference thereto: Lestrade v. Barth, 19 Cal. 660; Lumbard v. Abbey, 73 Ill. 177; White v. White, 105 Ill. 313; Warbritton v. Demorett, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613. See, too, Knight v. Glasscock, 51 Ark. 390, 11 S. W. 580; Ross v. Purse, 17 Colo. 28 Pac. 473; Smith v. Schweigerer, 129 Ind. 263, 28 N. E. 696.

d. Recorded Deed.—One cannot be deemed an innocent purchaser without notice, where, at the time of the conveyance, adverse claimants under a recorded title are in actual possession of the property: Crews v. Burcham, 66 U. S. (1 Black) 352, 17 L. ed. 91. See, too, Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593; McGill v. McGill, 4 La. Ann. 262. However, when one is in possession of certain rights in land by a recorded deed, and has other rights under an unrecorded deed, his possession is generally not notice of a claim or title beyond what he holds by the deed which is recorded: Great Falls Co. v. Webster, 15 N. H. 412. Inquiry is not ordinarily a duty when the apparent possession is consistent with the record title: Smith v. Yale, 18 Cal. 180, 89 Am. Dec. 167. Yet the mere fact that a person in possession has a deed upon record which does not appear to be from anyone connected with the title, does not absolve purchasers from making inquiries as to the nature of the occupant's claim. And if they purchase without making such inquiry, they will take subject to an unrecorded deed which the occupant holds from the true owner: Blandino v. Baker, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833.

a. **Unrecorded Instruments.**—Possession of land under an unrecorded contract of purchase or title bond is constructive notice to all persons of the rights of the possessor: *Moss v. Atkinson*, 44 Cal. 3; *Long v. Kerrigan*, 15 Ky. Law Rep. 65, 21 S. W. 99; *Corey v. Smalley*, 106 Mich. 257, 58 Am. St. Rep. 474, 64 N. W. 13; *Strickland v. Kirk*, 51 Miss. 795; *First Nat. Bank v. Chafee*, 98 Wis. 42, 73 N. W. 318. And possession by a purchaser under an unrecorded deed puts subsequent purchasers and others upon inquiry as to the occupant's rights: *McCaskle v. Amarine*, 12 Ala. 17; *Butler v. Thweatt*, 119 Ala. 325, 24 South. 545; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Aikins v. Paul*, 67 Ga. 97; *Warren v. Richmond*, 53 Ill. 52; *Higgins v. White*, 118 Ill. 619, 8 N. E. 808; *Hammel v. Devinney*, 39 Mich. 522; *Perkins v. Swank*, 43 Miss. 349; *Taylor v. Lowenstein*, 50 Miss. 278; *Munsion v. Reid*, 46 Hun. 399; *Hart v. Farmers' Bank*, 33 Vt. 252; *Weekly v. Hardesty*, 48 W. Va. 39, 35 S. E. 880; *Landes v. Brant*, 51 U. S. (10 How.) 348, 13 L. ed. 449; *Lea v. Polk County Copper Co.*, 62 U. S. (21 How.) 493, 16 L. ed. 203. It seems to be generally considered that possession under an unrecorded deed or contract of purchase is equivalent to registration of the deed or contract, and affords the same protection: *McCaskle v. Amarine*, 12 Ala. 17; *Higgins v. White*, 118 Ill. 619, 8 N. E. 808; *Joiner v. Duncan*, 174 Ill. 252, 51 N. E. 323; *Helm v. Kaddatz*, 107 Ill. App. 413; *Stovall v. Judah*, 74 Miss. 747, 21 South. 614; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004; *Welsh v. Schoen*, 13 N. Y. Supp. 71, 59 Hun. 356; *Watkins v. Edwards*, 23 Tex. 443; *Noyes v. Hall*, 97 U. S. 34, 24 L. ed. 909. But under the recording acts of some of the states an unrecorded deed seems good only against those with actual notice thereof, and actual notice is not inferable from the possession of the property by the grantee in such deed: *Hanly v. Morse*, 32 Me. 287; *Beal v. Gordon*, 55 Me. 482; *Pemroy v. Stevens*, 52 Mass. (11 Met.) 244; *Mara v. Pierce*, 75 Mass. (9 Gray) 306; *Dooley v. Wolcott*, 86 Mass. (4 Allen) 406; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234. But see *Drey v. Doyle*, 99 Mo. 459, 12 S. W. 287. Indeed, it seems in North Carolina that no notice, however full or formal, will supply the want of registration: *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579. See, also, *Peery v. Elliott*, 101 Va. 709, 44 S. E. 919.

VI. Persons in Possession.

a. **Prior Grantor.**—There are a number of authorities holding that the possession of a grantor, after the execution of a deed to the premises, is constructive notice to subsequent purchasers, encumbrancers, and creditors of any right, title, or interest which he claims therein. According to these authorities, the continued possession of a grantor after his conveyance of the property, seems to be quite as efficacious as notice of his claims as is the possession of a stranger to the record title: *Pell v. McElroy*, 36 Cal. 268; *Illinois Cent. R. R. Co. v. McCullough*, 59 Ill. 166; *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Gr*

State Bank, 50 Minn. 234, 36 Am. St. Rep. 640, 52 N. W. 651; *H. v. Berthelsen*, 19 Neb. 433, 27 N. W. 423; *Smith v. Myers*, 56 Neb. 76 N. W. 1084.

On the other hand, the authorities are numerous to the effect possession by a grantor after a full conveyance of the property is constructive notice to subsequent purchasers and encumbrancers of any rights reserved in the land by him or of any secret equities in his favor. Such possession, if not long continued, is presumed by the sufferance of the purchaser. This doctrine is recognized in the principal case, ante, p. 329. It is also recognized and applied in *Malette v. Wright*, 120 Ga. 735, 48 S. E. 229; *Crassen v. Swove*, 22 Ind. 427; *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. 243; *May v. Divant*, 75 Iowa, 116, 9 Am. St. Rep. 463, 32 N. W. 221; *Dod Davis*, 85 Iowa, 77, 52 N. W. 2; *Hoffman v. Gosnell*, 75 Md. 59, 21 Atl. 28; *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453; *A. v. Gregory*, 39 Mich. 68; *Brophy Min. Co. v. Brophy and Dale etc. Co.*, 15 Nev. 101; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Van K. v. Central R. R. Co.*, 38 N. J. L. 165; *Exon v. Dancke*, 24 Or. 11, 11 Pac. 1045; *Stiffler v. Retzlaff* (Pa. St.), 11 Atl. 876; *Curry v. Wil* (Tenn.), 38 S. W. 278; *Eylar v. Eylar*, 60 Tex. 315; *Watkins v. Sp* 8 Tex. Civ. App. 427, 28 S. W. 356; *Jinks v. Moppin* (Tex. Civ. A. 80 S. W. 390.

"The great weight of authority," to quote from *Hockman v. Thuma*, 68 Kan. 519, 75 Pac. 486, "sustains the rule, that when a vendor of real estate remains in possession after he has conveyed the property, he will not be allowed to assert secret equities in his favor respecting the land, for by his deed he has declared to the world that he has no right to possession. . . . A purchaser from the grantor or the party in possession need not inquire whether such party has reserved any interest in the land conveyed. So far as the purchaser is concerned, the actual occupant's deed is conclusive upon that point. The object of the law in holding possession constructive notice is to protect the possessor from the acts of others who do not derive title from him, not to protect him against his own acts, nor to protect him against his own deed. Therefore, where a grantor executes and delivers a deed of conveyance to go upon record, he says to the world, 'Though I am yet in the possession of the premises conveyed, I do so for a temporary purpose, without claim of right, and merely as tenant at sufferance of my grantee.' "

The foregoing doctrine applies to a judgment debtor remaining in possession of land after an execution sale thereof: *Cook v. Travis*, 100 N. Y. 400. But in Illinois, where the continued possession of a grantor is regarded as sufficient to put persons dealing with reference to the land on inquiry, it is held that the continuance of a debtor in possession after an irregular and unfair judicial sale for a grossly inadequate price, is constructive notice to grantees of the purchaser of defects in the sale: *Parker v. Shannon*, 137 Ill. 376, 27 N. E. 525.

And where a grantor remains in possession after a conveyance has been procured from him by fraud or duress, it would seem that such possession is not constructive notice of his equity arising out of such fraud or duress to a purchaser or mortgagee of the grantee: *Haftter v. Strange*, 65 Miss. 323, 7 Am. St. Rep. 659, 3 South. 190; *Hickman v. Hoffman*, 11 Tex. Civ. App. 605, 33 S. W. 257; *Summers v. Sheern* (Tex. Civ. App.), 37 S. W. 246; *Matesky v. Feldman*, 75 Wis. 103, 43 N. W. 733. See, too, *Stevenson v. Campbell*, 185 Ill. 527, 57 N. E. 414. A contrary view is taken in *Griffin v. Haskins*, 22 Ill. App. 264; *Rea v. Crossman*, 95 Ill. App. 70; *Kahre v. Rundle*, 38 Neb. 315, 56 N. W. 888.

If the possession of a grantor, after making a conveyance, is long continued, it may be more reasonable to refer it to his right to occupancy rather than to the sufferance of the grantee. Possession, therefore, for an unreasonable period after a conveyance may well be sufficient to put persons upon inquiry as to the occupant's rights. Thus, it is said that where agricultural lands are sold during a crop season, it is unreasonable to presume that the grantee will permit the grantor to hold by sufferance after the time when land is usually entered upon for the purpose of next year's cultivation. Possession after that time cannot be explained upon the presumption of sufferance: *Turman v. Bell*, 54 Ark. 35, 26 Am. St. Rep. 35, 15 S. W. 886. See, too, *Farnsworth v. Childs*, 4 Mass. 637, 3 Am. Dec. 249.

And the possession of land by the original grantor at the time of its conveyance by one not the immediate grantee of such original grantor is not constructive notice to the purchaser of any equitable title or claim of the original grantor: *Lamoreaux v. Meyers*, 68 Wis. 24, 31 N. W. 331.

b. Prior Grantee.—Where a vendee of land goes into possession under a deed or contract of sale, his possession is constructive notice of his rights to subsequent purchasers and encumbrancers. If, thereafter, his grantor conveys, agrees to convey, or mortgages the property, the grantee or the mortgagee, as the case may be, is chargeable with notice of the prior vendee's rights, and the prior vendee is entitled to protection against the subsequent grantee or mortgagee. Cases of this kind are numerous; and they generally arise where the grantor has failed to fully execute the contract of sale to the first purchaser, or, if he has executed it, the instrument has not been placed on record: *Sawyers v. Baker*, 66 Ala. 292; *Watson v. Mancill*, 76 Ala. 600; *Beattie v. Crewdson*, 124 Cal. 577, 57 Pac. 463; *Cabeen v. Breckenridge*, 48 Ill. 91; *Lipp v. Hunt*, 25 Neb. 91, 41 N. W. 143; *Izard v. Kimmel*, 26 Neb. 51, 41 N. W. 1068; *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 296; *Roberts v. Decker*, 120 Wis. 102, 97 N. W. 519; *Hobach v. Porter*, 154 U. S. 549, 14 Sup. Ct. Rep. 1160, 18 L. ed. 30; *Kirby v. Tallmadge*, 160 U. S. 379, 384, 16 Sup. Ct. Rep. 349, 40 L. ed. 463.

c. Grantee in Quitclaim Deed.—If land is in possession of one holding under an unrecorded deed, a subsequent grantee in a quitclaim deed is chargeable with notice of the occupant's title, and is not

a bona fide purchaser: *Wolf v. Zabel*, 44 Minn. 90, 46 N. W. 81; *J. v. Brenizer*, 70 Minn. 525, 73 N. W. 255; *Hoyt v. Schuyler*, 19 1 652, 28 N. W. 306. See, too, *Knapp v. Bailey*, 79 Me. 195, 1 Am. Rep. 295, 9 Atl. 122.

d. Tenant in Common.—While the law is not entirely clear on question, the better rule seems to be, that the actual occupancy of one coparcener or tenant in common is the rightful possession of all, and if a title under which they might hold is of record and is consistent with the occupancy, the possession must be referred to the record, and will not be constructive notice of any other title, such as an unrecorded deed from a co-owner: *May v. Sturdivant*, 75 Iowa, 9 Am. St. Rep. 463, 39 N. W. 221; *Dutton v. McReynolds*, 31 Minn. 16 N. W. 468; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 St. Rep. 430, 65 Pac. 1004; *Martin v. Thomas* (W. Va.), 49 S. E. 1. Some authorities take the view, however, that where a tenant in common who is in possession purchases the interest of his cotenant, does not record the deed, his possession puts subsequent purchasers and creditors upon inquiry: *Farmers' Nat. Bank v. Sperling*, 113 273; *Collum v. Sanger* (Tex.), 82 S. W. 459. What has been said in prior part of this note under "Possession Consistent with Record" and "Possession after Change in Occupant's Title," should be read in connection. See, also, *Storthz v. Chaplin*, 71 Ark. 31, 70 S. W. 1. *Kirkham v. Moore*, 30 Ind. App. 549, 65 N. E. 1042; *Allday v. W. aker*, 66 Tex. 669, 1 S. W. 794.

In *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. 1 259, 45 N. W. 1136, it is held that mere possession of a tenant in common is notice of his own title only, and is not notice of a change of title on the part of his cotenant. He is presumed to be in of his right, by virtue of his own title, and not under his cotenant's title.

e. Tenant or Lessee.

1. Notice of Tenant's Rights.—Persons dealing with reference to land in the possession of a tenant or lessee are bound, as a rule, to take notice of the rights and claims of the lessee or tenant: *Willis v. Brown*, 14 Ill. 200; *Leebrick v. Stahle*, 68 Iowa, 515, 27 N. W. 1. *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743; *McCall v. Yard* N. J. Eq. 58; *Howell v. Denton* (Tex. Civ. App.), 68 S. W. 1002; *1 v. Pfeiffer*, 18 Wis. 510. Thus, a purchaser of premises in the possession of a tenant under an unrecorded lease is not an innocent purchaser: *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713. Compare *Ta v. Peabody*, 162 Mass. 473, 39 N. E. 280, and see "Unrecorded Instruments," ante.

Not only is the possession of a tenant or lessee constructive notice of all his rights growing out of the tenancy or the lease itself, but possession, according to many authorities, is also notice of all interests and equities acquired by collateral or subsequent agreements including a contract for the purchase of the premises: See "Possession after Change in Occupant's Title," ante; *Russell v. Moore*

Ky. (3 Met.) 436; *Havens v. Bliss*, 26 N. J. Eq. 363; *Anderson v. Brinser*, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205. According to other authorities, however, the possession of a tenant is not constructive notice of a right he claims independently of his lease; and there is, it must be confessed, much reason in such a rule: *Red River Valley Land etc. Co. v. Smith*, 7 N. Dak. 236, 74 N. W. 194; *Smith v. Miller*, 68 Tex. 72; *Brown v. Roland*, 11 Tex. Civ. App. 648, 33 S. W. 273. "Upon authority, and principle as well, it must be held," to quote from *Schneider v. Mahl*, 82 N. Y. Supp. 27, 84 App. Div. 1, "that a purchaser of real property, occupied by persons sustaining only the relation of tenants to the owner, may assume that their possession is the possession of the owner, and such purchaser is not chargeable with knowledge of any secret agreement which may have been made between such owner and such tenant or tenants affecting the title to the property, and which is wholly independent of and outside of the agreement or contract establishing such relation, and in no manner involved by the terms or conditions of the lease or agreements of occupancy."

The possession of a tenant after the expiration of the term is not only notice of all his rights and equities growing out of the original lease, but also of such additional or different rights and equities as he acquires under a subsequent agreement: *Allen v. Gates*, 73 Vt. 222, 50 Atl. 1092, citing 2 Pomeroy's Equity Jurisprudence, sec. 625; *Cunningham v. Pattee*, 99 Mass. 248.

2. *Notice of Landlord's Rights.*—In England, the fact that a tenant is in occupation is notice of his own rights, but is not notice of the rights of those through whom he claims: *Hunt v. Luck* (1901), L. R. 1 Ch. Div. 45. And Justice Story appears to have entertained this view of the law: *Flagg v. Mann*, 2 Sum. 486, Fed. Cas. No. 4847. See, too, *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234. But the general rule has been recognized in a multitude of decisions, that the possession of premises by a tenant is constructive notice of the landlord's rights and equities therein as well as notice of the tenant's rights and equities. Possession, to be operative as constructive notice, may be in person, or through a tenant: *Dutton v. Warschaur*, 21 Cal. 609, 82 Am. Dec. 765; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Crawford v. Chicago etc. E. R. Co.*, 112 Ill. 314; *Mallett v. Kaehler*, 141 Ill. 70, 30 N. E. 549; *Bowman v. Anderson*, 82 Iowa, 210, 31 Am. St. Rep. 473, 47 N. W. 1087; *Townsend v. Blanchard*, 117 Iowa, 38, 90 N. W. 519; *Deetjen v. Richter*, 33 Kan. 410, 6 Pac. 595; *Hanly v. Morse*, 32 Me. 287; *Wilkins v. Bevier*, 43 Minn. 213, 19 Am. St. Rep. 238, 45 N. W. 157; *Thompson v. Borg*, 90 Minn. 209, 95 N. W. 896; *Levy v. Holberg*, 67 Miss. 526, 7 South. 431; *Wanner v. Sisson*, 29 N. J. Eq. 141; *Purcell v. Enright*, 31 N. J. Eq. 74; *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316; *Edwards v. Thompson*, 71 N. C. 177; *Randall v. Lingwall*, 43 Or. 383, 73 Pac. 1; *Wright v. Wood*, 23 Pa. St. 120; *Mainwarring v. Templeman*, 51 Tex. 205; *League v. Snyder*, 5 Tex. Civ. App. 13, 23-

S. W. 825; *Allison v. Pitkin*, 11 Tex. Civ. App. 655, 33 S. W. 293; *Colum v. Sanger* (Tex.), 82 S. W. 459; *United States v. Sliney*, 21 Fed. 894. For example, where a purchaser of land receives no deed, but places a tenant in possession, the grantee in a subsequent quitclaim deed is chargeable with notice of the purchaser's equities: *O'Neill v. Wilcox*, 115 Iowa, 15, 87 N. W. 742.

The possession of a tenant under a written lease, before the commencement of his term, is constructive notice of the landlord's title: *Haworth v. Taylor*, 108 Ill. 275. And the possession of a lessee at the expiration of the lease is notice of his lessor's title: *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, 43 S. W. 53.

The possession of part of a tract by a lessee is constructive notice of his lessor's title to the entire tract: *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, 43 S. W. 53.

Where land in the possession of a tenant is conveyed, the continuance of the possession of the tenant, as tenant of the grantee, is not regarded, by some authorities, as constructive notice of the unrecorded deed: *Kirk v. Paulk*, 85 Ala. 186, 4 South. 825; *Griffin v. Hall*, 111 Ala. 601, 12 South. 485; *Wahrenberger v. Waid*, 8 Colo. App. 200, 45 Pac. 501; *Stockton v. National Bank* (Fla.), 34 South. 897; *Veazie v. Park*, 23 Me. 170; *Loughridge v. Bowland*, 52 Miss. 546. Other authorities, however, seem to take a contrary view of the law: *Collins v. Moore*, 115 Ga. 327, 41 S. E. 609; *Hannan v. Seidentopf*, 113 Iowa, 659, 82 N. W. 44; *Duff v. McDonough*, 155 Pa. St. 10, 25 Atl. 608; *Watkins v. Edwards*, 23 Tex. 443.

f. Life Tenant.—The possession of a tenant for life does not, according to *Wallace v. Jones*, 93 Ga. 419, 21 S. E. 89, operate as notice to a purchaser of the estate in remainder of any defect in the title of his immediate vendor to the remainder interest, although he may not purchase the remainder separately, but the whole fee, his vendor having a conveyance which covers in the same deed both the life estate and the remainder.

g. Agent of Owner.—Possession may be through a representative of the owner: See "Tenant or Lessee," ante. But where an owner, such as a grantee in an unrecorded deed, has an agent in charge of the property to rent it, the agent having a key to the house, but not occupying it, this does not amount to such possession as will bind subsequent purchasers on inquiry: *Phoenix Ins. Co. v. Neal*, 23 Tex. Civ. App. 427, 56 S. W. 91.

h. Husband and Wife.—Where land is occupied by husband and wife, and there is a recorded title in one of them, such joint possession is not notice of an unrecorded title in the other: *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. Rep. 349, 40 L. ed. 463. See, too, *Mott v. Jones*, 98 Ala. 443, 13 South. 782; *Schumacher v. Truman*, 134 Cal. 430, 66 Pac. 591; *Garrard v. Hull*, 92 Ga. 787, 20 S. E. 357; *Paulus v. Ind.* 34; *Atwood v. Bearss*, 47 Mich. 72, 10 N. W. 112; *C*

v. White, 7 Lans. 1; Farmers' etc. Bank v. Wallace, 45 Ohio St. 152, 12 N. E. 439; Townsend v. Little, 109 U. S. 504, 3 Sup. Ct. Rep. 357, 27 L. ed. 1012. In such a case, a purchaser finding title in one would be thrown off his guard in respect to the title of the other; and the general rule is that if possession is consistent with the record title, it is not notice of an unrecorded title. But where land is used for the purpose of a home, and is occupied jointly by husband and wife, neither of whom has title of record, one dealing with reference to the land is bound to make inquiry as to their title: Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. Rep. 349, 40 L. ed. 463.

Residence by a husband and wife upon land which she claims and in which he claims no interest, is, according to Walker v. Neil, 117 Ga. 733, 45 S. E. 387, notice of whatever claim she has therein. See, too, Humphrey v. Moore, 17 Iowa, 193.

The possession by a husband of land belonging to his wife's separate estate is referable to his representative capacity of trustee, and is constructive notice of her title: Brunson v. Brooks, 68 Ala. 248. And it is held in Fassett v. Smith, 23 N. Y. 252, that a husband's possession of his wife's land is regarded as her possession, so far as not to put a purchaser upon inquiry concerning the rights of a third person of whom the husband, in order to cover his own fraud, took a lease, unknown to the purchaser.

Where a husband and wife separate after having occupied land as a homestead, and he remains in possession of the land, the records showing a deed to her, a grantee of the wife is held, in Stevens v. Castel, 63 Mich. 111, 29 N. W. 828, to be put on inquiry as to the husband's rights. So one who purchases from a husband who has separated from his wife, knowing that she is in possession claiming the premises as her own, is not an innocent purchaser: Allen v. Moore, 30 Colo. 307, 70 Pac. 682.

The possession of her property by a married woman living with her husband, has the same effect as constructive notice, in the absence of a recorded title in her husband inconsistent with it, that is allowed to a possession by her husband of his own property: Brown v. Carey, 149 Pa. St. 134, 23 Atl. 1103.

1. Parent and Child.—Where a father gives or conveys land to his child, or agrees to do so, and the child takes possession, his possession is constructive notice of his rights: Michie v. Ellair, 54 Mich. 518, 20 N. W. 564. See, also, Sanford v. Davis, 181 Ill. 570, 54 N. E. 977; Watters v. Connelly, 59 Iowa, 217, 13 N. W. 82; Halsa v. Halsa, 8 Mo. 303. But where minor children reside with their father, who is in possession of land to which he has the legal title, the children's residence on the property does not put a purchaser from the father on inquiry as to their secret equities: Goodwynne v. Bellerby, 116 Ga. 901, 43 S. E. 275. And where two boys, aged twenty and twenty-two, respectively, reside with their parents, and assist their father in conducting his business, but exercise no control or dominion over

the property, a mortgagee is not chargeable with notice of claims under a parol agreement with their father: *Adams-Booth v. Reid*, 112 Fed. 106. See, also, *Stone v. Cook*, 79 Ill. 424; *Ba v. Golde*, 88 Hun, 115, 34 N. Y. Supp. 587.

The possession of a farm by a woman claiming under an unrecorded deed from her son in law, who was, at the time of the conveyance, residing on the farm, and who continued to reside there after such date the same as before, exercising authority to the extent over the farm and the farming, and with whom the grantor resided as a member of the family, is not sufficient to impart notice of title under her deed, even though she generally managed the business of the farm, and sold the produce, it not appearing that she exercised exclusive control over it: *Elliot v. Lane*, 82 Iowa 31 Am. St. Rep. 504, 48 N. W. 720. But where a woman, who is the head of a family, occupies a house to which her minor son, who lives with her, has the legal title, her occupancy puts an intending purchaser on inquiry as to her interests in the property: *Watts v. Murray*, 54 Ark. 499, 16 S. W. 293.

j. Widow and Heirs.—Where a widow, who occupies a house in which she is entitled to dower, while her son, the sole heir at law, occupies the rest of the house, releases her dower to him by an unrecorded deed, her continued occupation thereafter will not constitute notice to his mortgagee, of a title in her to the part of the house occupied by her, acquired by an unrecorded deed from her son contemporaneous with her release of dower: *Rankin v. Coar*, 46 Ark. 566, 22 Atl. 177, 11 L. R. A. 661. Said the court: "The rule is, that when the occupation by one is not exclusive, but in connection with another, with respect to whom there exists a relationship sufficient to account for the situation, and the circumstances do not suggest an inconsistent claim, then such a possession will not give notice of a right by unrecorded grant. It will be neither notorious nor unequivocal. Where a widow contributed a part to the purchase money of a farm, and her brother, who contributed the remainder, took title thereto in his own name without her knowledge, it has been held that the fact that she lived on the farm did not give notice of her resulting trust to a purchaser from him: *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182."

The possession of premises by an heir puts a mortgagee on inquiry as to the heir's rights, although the mortgagor has a complete title: *Ramirez v. Smith*, 94 Tex. 184, 59 S. W. 258. And the possession of the heirs of a lessee, where they hold over after the expiration of the lease, is constructive notice to purchasers of the interest of the lessor: *Huntington v. Mattfield* (Tex. Civ. App.), 55 S. W. 2d 100.

k. Parties to Judicial Proceedings.—Where a person claiming under a sheriff's deed is in possession of land, one who purchases from a person not in possession is affected with notice of the interest of the occupant: *Smith v. Olson*, 23 Tex. Civ. App. 458, 56 S. W. 2d 100. So, where a purchaser at foreclosure proceedings is in possession of the land, he is affected with notice of the interest of the occupant.

sion of the property, a grantee of an adverse claimant is not a bona fide purchaser: *Banks v. Allen*, 127 Mich. 80, 86 N. W. 383.

Where property is sold upon a judgment against a person having only a naked legal title, when the person holding the equitable title is in possession, such possession is notice to the purchaser: *Glidwell v. Spangh*, 26 Ind. 319. See, too, *Parker v. Shannon*, 137 Ill. 376, 27 N. E. 525.

The continued possession of premises "by one whose title has been devoted by a judicial decree is presumed to be in subordination to the rights of the party in whose favor the decree was rendered, and is not constructive notice of any rights or claims of the possessor adverse to the decree": *Harms v. Coryell*, 177 Ill. 496, 53 N. E. 87. See, also, *Hintrager v. Smith*, 89 Iowa, 270, 56 N. W. 456; *Dawson v. Danbury Bank*, 15 Mich. 489.

VII. Persons Chargeable with Notice.

a. In General.—Where a person is in possession of land, all other persons dealing or contracting with reference to the land are put upon inquiry as to the occupant's rights. Or, as is often said, the possession of land is notice to all the world of the title or right of the occupant: *Tate v. Pensacola Gulf etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 South. 542; *Baldwin v. Sherwood*, 117 Ga. 827, 45 S. E. 216; *Gray v. Zellmer*, 66 Kan. 514, 72 Pac. 228; *Bolton v. Roebuck*, 77 Miss. 710, 27 South. 630; *Prickett v. Muck*, 74 Wis. 199, 42 N. W. 256.

b. Purchasers.—But the doctrine of constructive notice finds its most frequent application, perhaps, to purchasers; and the general rule is unquestioned, that he who purchases real estate when a third person is in possession is put upon inquiry as to the occupant's rights, and chargeable with notice of all facts which a reasonable investigation would disclose. If, in such a case, he buys without making an inquiry concerning the rights or title of the occupant, he cannot, generally speaking, be regarded as a bona fide purchaser: *Brewer v. Brewer*, 19 Ala. 481; *Phillips v. Costley*, 40 Ala. 486; *Atkinson v. Ward*, 47 Ark. 533, 2 S. W. 77; *Kendall v. Davis*, 55 Ark. 318, 18 S. W. 185; *Wyatt v. Elam*, 23 Ga. 201, 68 Am. Dec. 518; *Franklin v. Newsom*, 53 Ga. 580; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Bartling v. Brasuhn*, 102 Ill. 441; *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; *Barnes v. Union School Dist.*, 91 Ind. 301; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409; *Laraway v. Larns*, 63 Iowa, 407, 19 N. W. 242; *Knox v. Thompson*, 11 Ky. (1 Litt.) 350, 18 Am. Dec. 246; *Bryant v. Main*, 25 Ky. Law Rep. 1242, 77 S. W. 680; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Baynard v. Norris*, 5 Gill, 468, 46 Am. Dec. 647; *Russell v. Swezey*, 22 Mich. 235; *Matteson v. Vaughn*, 38 Mich. 373; *Groff v. Ramsey*, 19 Minn. 44; *Siebert v. Rosser*, 24 Minn. 155; *Jones v. Loggina*, 37 Miss. 546; *Martin v. Jones*, 72 Mo. 23; *Pleasants*

v. Blodgett, 39 Neb. 741, 42 Am. St. Rep. 624, 58 N. W. 423; duck v. Wilmarth, 5 N. H. 181, 20 Am. Dec. 570; Havens v. 26 N. J. Eq. 363; Brice v. Brice, 5 Barb. 533; Johnson v. H. 88 N. C. 388; Staton v. Davenport, 95 N. C. 11; Kelley v. Stan 13 Ohio, 408; McKinzie v. Perrill, 15 Ohio St. 162; Rowe v. I. 105 Pa. St. 543; Graham v. Nesmith, 24 S. C. 285; Mullins v. berly, 50 Tex. 457; Orr v. Clark, 62 Vt. 136, 19 Atl. 929; Sow Butler, 71 Vt. 271, 44 Atl. 355; Chapman v. Chapman, 91 Va. 50 Am. St. Rep. 846, 21 S. E. 813; Peterson v. Philadelphia Mfg 33 Wash. 464, 74 Pac. 585; Lowther Oil Co. v. Miller-Sibley Oil 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433; Stewart v. Sweeney, 14 Wis. 468; Van Gunden v. Virginia Coal etc. Co., 52 838, 3 C. C. A. 294.

c. **Mortgagees.**—And possession of land by a third person a time a mortgage is placed thereon puts the mortgagee on in as to the occupant's rights; and the mortgage lien is junior and ordinate to the title of the occupant: See the principal case, p. 326; Anthe v. Heide, 85 Ala. 236, 4 South. 380; Reynolds v. 105 Ala. 446, 17 South. 95; Jowers v. Phelps, 33 Ark. 465; He v. Levy, 55 Cal. 117; Linder v. Whitehead, 116 Ga. 206, 42 S. E. Weiserberger v. Wisner, 55 Mich. 246, 21 N. W. 331.

BUEHNER v. CREAMERY PACKAGE MANUFACTURING COMPANY.

[124 Iowa, 445, 100 N. W. 345.]

EMPLOYER'S LIABILITY—Unguarded Cogwheels.—An employer does not furnish a reasonably safe place to work when he unguarded cogwheels under a table at which an employé works within a foot from where he stands, it being practicable to them, and the exigencies of the service occasionally requiring employé to stoop below the table to pick up fallen boards. (p. 357.)

EMPLOYER'S LIABILITY—Insufficient Light.—An employer who continues to work in a place after it becomes insufficiently lighted, without complaint on his part or promise on the part of the employer to remedy the defect, assumes the risk of the accident. (p. 357.)

EMPLOYER'S LIABILITY—Promise to Repair.—When an employé complains that cogwheels where he is at work should be guarded, and is assured that they will be, he cannot be held liable for an injury two days later, to have assumed, as a matter of law, the liability resulting from leaving them unguarded. (p. 357.)

EMPLOYER'S LIABILITY—Concurrent Negligence.—If an employé would not have been injured had not cogwheels been negligently left unguarded, it is immaterial whether or not the employer was negligent, far as concerns the employer's liability, whether there was a concurrent negligence on the part of the employé.

concurrent cause of the injury, such as the negligence of a coemployé. (p. 358.)

EMPLOYER'S LIABILITY—Contributory Negligence.—Where an employé throws his hand into revolving cogwheels, the danger of which would have been apparent had he not been distracted by surrounding conditions, it is for the jury to say whether the circumstances were calculated to throw him off his guard and excuse him for acting as he did. (p. 359.)

APPEAL—Delay in Serving Argument.—Where the time for serving an argument on appellee's attorney expires Sunday, but, although mailed in time, it is not delivered until Monday morning, this will not support a motion for affirmance when there has been no unreasonable neglect and no real prejudice. (pp. 359, 360.)

Ezra A. Maxwell, for the appellant.

Ryan, Ryan & Ryan, for the appellee.

⁴⁴⁶ **McCLAIN, J.** Plaintiff, who was then about fifteen years of age, was employed by defendant in taking away from a tongue and groover machine short boards which had been tongued and grooved by the machine, to be fitted together into heads for butter tubs, and he had been so engaged for about a month. His place of work was at the end of a table, on which the boards were delivered by the machine, being fed into it by a coemployé, one Hopkins, who stood at the other end of the machine. The rate of speed with which the boards were run through the machine was under the control of Hopkins, and at the time plaintiff was injured the machine was so geared as to run the boards through quite rapidly. It appears that when the machine was thus geared for rapid work the boards were sometimes thrown beyond the end of the table. Under the table, and less than a foot from plaintiff as he stood at his work, was a set of cogwheels, so geared as to turn inwards, and these cogwheels were at the time of the accident, to be hereafter described, uncovered and ⁴⁴⁷ unprotected, so far as access to them under the table was concerned. The evidence tended to show that one of the boards thrown out by the machine went beyond the table, and fell to the floor; that plaintiff stooped to pick it up, and while thus in a stooping position with his head about on a level with the table, another board was thrown beyond the table by the machine, which struck him in the head, causing him to jerk upward and backward, and while doing so his thumb was caught in the cogs, and so crushed that he lost a portion of the first joint. There was further evidence to show that it was not unusual for the boards to fall beyond the end of the table, and that it was plaintiff's duty

v. Blodgett, 39 Neb. 741, 42 Am. St. Rep.
 duck v. Wilmarth, 5 N. H. 181, 20 Am.
 26 N. J. Eq. 363; Brice v. Brice, 5
 88 N. C. 388; Staton v. Davenport,
 13 Ohio, 408; McKinzie v. Perrill
 105 Pa. St. 543; Graham v. Ne
 berly, 50 Tex. 457; Orr v. Cl
 Butler, 71 Vt. 271, 44 Atl.
 50 Am. St. Rep. 846, 21 S.
 33 Wash. 464, 74 Pac. 5
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c. Mortgagees

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 p. 326; An' recovery.

105 Ala. reference to the failure to place a guard in fr
 v. Levy, 100
 Weise, cogwheels under the table, so as to avoid the dang
 operator, stooping under the table to pick up a board,
 come in contact with them, we think the evidence suffi
 shows that such guarding would have been practicable, an
 it would have been a reasonable precaution against an ac
 such as was likely to occur, and did occur, in the case o
 plaintiff. 448 The defendant ought to have anticipated
 a danger and provided against it. In Nadau v. White
 Lumber Co., 76 Wis. 120, 20 Am. St. Rep. 29, 43
 1135, involving the question of liability of an employ
 unguarded cogwheels, language is used which we think
 liarily pertinent here: "That this set of cogwheels wa
 gerous, even to the most experienced workman, can hard
 mit of a doubt. But slight forgetfulness on the part
 workman while attending to his work might bring him i
 tact with it; an accidental slip while at work might bri
 clothing and limbs in contact with it; and we have no hes
 in holding that, when an employer places such a dan
 piece of machinery, into which his employé, by the leas
 getfulness or unavoidable accident, may be thrown and ser
 injured, in the immediate vicinity of the place where hi
 ployé must do his work, he fails to furnish him a reaso
 safe place for doing his work, and is guilty of gross negli
 therefore, when the usefulness of the machine is not enh
 by reason of its being uncovered, and when the expense of
 ng would be a mere trivial sum." It sufficiently appear

*CREAMERY ETC. MFG. CO.
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ing under the table was not the result
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that, in the exercise of reason-
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boards which dropped.
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evidence that, while the
ly sufficient, some of
by refuse and dirt, so that
was rather dark under the table.

ed in the employment under these con-

complaint and promise on the part of defend-
the defects would be remedied, he would, no doubt,
Perly be held to have assumed ⁴⁴⁹ the risk, and this seems
have been the fact as to the want of light, for, while there
evidence that he complained that the light was insufficient,
is no proof of any assurance that any change would be
in the conditions in this respect. It appears that the
man to whom the complaint was made responded, "Never
d, it will soon be light enough." But we do not think that
involved any promise of change in the supply of light, but
an assurance that the natural supply would be better at
er times.

But with reference to the unguarded condition of the cog-
wheels, it appears that two days before the accident, plaintiff
complained to the foreman about the cogwheels being uncovered,
saying that his trousers had got caught in the cogs, and that
something ought to be put over them, and the foreman re-
sponded that he would get them fixed. Plaintiff testified that
he remained in the employ of defendant, exposed to the danger
involved in the uncovered condition of the cogwheels, because
he thought, from what the foreman said to him, that they
would be covered. It appears that there was a reasonable time
after the complaint within which protection against danger from
the uncovered condition of the cogwheels might have been fur-
nished, and we think that, in view of the complaint and the
promise of repair, the plaintiff cannot be held, as matter of
law, to have assumed the risk resulting from leaving them un-
covered: *Greenleaf v. Dubuque etc. Ry. Co.*, 33 Iowa, 52; *Pie-
art v. Chicago etc. Ry. Co.*, 82 Iowa, 148, 47 N. W. 1017; *Stout-
enburgh v. Dow etc. Co.*, 82 Iowa, 179, 47 N. W. 1039; *Home-
lake Min. Co. v. Fullerton*, 69 Fed. 923, 16 C. C. A. 545.

It is argued for defendant that the proximate cause of accident was either the negligence of Hopkins, the coemployee in feeding a board into the machine while plaintiff was in position as to be struck by it when thrown out, or the blow received by plaintiff from such board, and not the uncovered cogwheels. But, excluding the negligence of plaintiff himself is immaterial ⁴⁵⁰ whether there was another concurrent cause for the injury, if the injury would not have happened had cogwheels not been negligently left unguarded. The very purpose of guarding the cogwheels would have been to avoid injury to an employé, if by some cause, not due to his own fault, was brought within reach of them. We think there is no occasion here to go into an elaborate discussion of the question of proximate cause, but the conclusion reached is supported by the views of this court in the following cases: Walrod v. Webster County, 110 Iowa, 349, 81 N. W. 598, 47 L. R. A. 480; Harvey v. Clarinda, 111 Iowa, 528, 82 N. W. 994; Hodges v. Waterloo, 109 Iowa, 444, 80 N. W. 523.

Finally, it is argued for appellee that plaintiff well knew position of the cogwheels, and the danger incident to their being uncovered, and that the injury received was due to his own negligent act in throwing his hand up from below so as to allow his thumb to be caught between the revolving wheels. It is true that plaintiff, knowing the danger, should have avoided it, and, unless he was excused by reason of attending circumstances from fault in failing to avoid such danger, there can be no recovery. But there were circumstances which the evidence tended to establish from which the jury might have found that plaintiff was not at fault. These circumstances were that plaintiff was required to work at great speed in order to take care of the boards as fast as they were thrown out by the machine, and was distracted by the blow on the head received while he was stooping over, so that for the time being he was not in condition to realize the probable effect of, or voluntarily control, the motion of his hand. We cannot say as a matter of law, that he was negligent in stooping over and putting his head in such position that he might be struck by a board thrown out by the machine, for the contact with the cogwheels was not a result which he could have reasonably anticipated as likely to follow if his head should be struck by a board. With reference to the connection of Hopkins with the accident, it does not clearly appear that the board which struck ⁴⁵¹ plaintiff was put into the machine by Hopkins af

he saw, or could have seen, that plaintiff was in a position to be struck by it. It seems probable from the evidence that the board which struck plaintiff had already been started through the machine when he stooped over. We reach the conclusion that the circumstances were such as to be properly for the consideration of the jury in determining whether plaintiff was guilty of contributory negligence in not avoiding a danger which would have been apparent to him had he not been distracted by the surrounding conditions. Each case must be considered with reference to the peculiar circumstances involved, but the following cases may be cited as supporting our conclusion: *Harker v. Burlington etc. Ry. Co.*, 88 Iowa, 409, 45 Am. St. Rep. 242, 55 N. W. 316; *Strong v. Iowa Cent Ry. Co.*, 94 Iowa, 380, 62 N. W. 799; *Tobey v. Burlington etc. Ry. Co.*, 94 Iowa, 256, 62 N. W. 761, 33 L. R. A. 496; *Lorenz v. Burlington etc. Ry. Co.*, 115 Iowa, 377, 88 N. W. 835, 56 L. R. A. 752. As we have said in *Taylor v. Wabash Ry. Co.*, 112 Iowa, 157, 83 N. W. 892, all the facts must be considered in determining the question whether the employé exercised reasonable care, and it is for the jury to say whether circumstances calculated to throw the employé off his guard would excuse him for acting as he did.

Appellee's motion to have the case submitted as of a date prior to the filing of appellant's argument, and to affirm for want of argument, has been ordered submitted with the case. The cause was assigned to be submitted on June 7th, and appellant's argument should therefore have been served on attorney for appellee on May 8th: See rule 44. May 8th, however, was Sunday, and as, by the rule, appellant is required to serve his argument at least thirty days before the date assigned for the hearing, perhaps we ought to hold that Saturday was the last day for service. However this may be, the showing for appellant in resistance to the motion is that he mailed his argument at Waterloo on the 6th, in time for it to have reached appellee's attorneys in Des Moines by due course of mail on the 7th. It was not actually delivered to them by carrier ⁴⁸³ until about 10 o'clock on the morning of the 9th. Perhaps if there were no excuse for postponing the mailing of the argument until the evening of the very last day on which it could be mailed to possibly reach the opposing attorney in time, or if there were no excuse other than the ordinary one of failure of the printer to complete the work at the very day on which he has contracted to do so, we might be inclined to e

force the rule strictly, but in this case it appears that a casual delay in the preparation of his argument, which appellant's attorney could not have anticipated interference with the preparation of his argument, and we do not think we ought to affirm the case on account of what was in only a few hours' delay in serving his argument on appellant's counsel. They were not entitled to have the argument in time to make any preparation for their own argument in response on Saturday, and it is not to be assumed that they would have been in their client's cause upon Sunday, and we are not disposed to enforce the rule with harshness where there has been no reasonable neglect and no real prejudice. The motion to dismiss the cause as of May 7th, and to affirm for want of argument on the part of appellant, is overruled.

For the reasons set forth in this opinion, the action of the trial court in sustaining the motion to direct a verdict for the defendant, and in rendering judgment thereon, is reversed.

The Doctrine of Assumption of Risk in the law of master and servant is discussed in the extended notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 886-896; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 314-321; and the recent cases of *Big Stone Gap Co. v. Ketron*, 102 Va. 23, 102 Am. St. Rep. 839; *Christiensen v. Grande etc. Ry. Co.*, 27 Utah, 132, 101 Am. St. Rep. 945; *Murray v. Boston etc. R. R.*, 72 N. H. 32, 101 Am. St. Rep. 660; *Jones v. Kansas City etc. R. R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434.

The Doctrine of Contributory Negligence as affecting the employer's liability for injuries to his employes is discussed in the monographic notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 886-896; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 314-321.

The Duty of Employer to Guard or inclose dangerous machinery is discussed in the extended note to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 299.

The Effect of Employer Promising to Repair defective machinery or appliances is discussed in the monographic notes to *Gulf etc. Ry. Co. v. Brentford*, 23 Am. St. Rep. 385-388; and the subsequent case of *Gulf etc. Ry. Co. v. Garren*, 96 Tex. 605, 97 Am. St. Rep. 939, cases cited in the cross-reference note thereto.

STATE v. HUNTER.

[124 Iowa, 569, 100 N. W. 510.]

CONDITIONAL PARDON—Suspension of Sentence.—Power conferred on the governor to grant pardons includes the power to grant a conditional pardon; and an indefinite suspension of sentence on conditions is, in practical effect, a conditional pardon. (p. 363.)

CONDITIONAL PARDON.—As a Condition to the continuance of a suspension of sentence, the governor may require the prisoner to abstain from acts not in themselves criminal nor in violation of law. (p. 363.)

CONDITIONAL PARDON—Revocation.—No Judicial Proceeding is necessary to authorize the governor to terminate the suspension of a sentence which he has granted on the express condition that it may be revoked at his discretion and shall remain in force only during his pleasure. (p. 364.)

CONDITIONAL PARDON—Whether a Contract.—It is only in a somewhat fictitious sense that a conditional pardon is spoken of as a contract; it is, as a matter of fact, simply the grant and acceptance of a privilege, with a condition attached, in accordance with which the privilege may be revoked. (p. 365.)

CONDITIONAL PARDON—Forfeiture of Credit for Good Conduct.—The governor has no authority to insert a provision in a suspension of sentence, that a violation of its conditions shall work a forfeiture of the prisoner's statutory diminution of sentence for good conduct while in prison. (pp. 365, 366.)

Charles W. Mullan, attorney general, C. J. Cash, county attorney, and F. O. Ellison, for the appellant.

Thomas H. Milner, for the appellee.

⁵⁶⁶ **McCLAIN, J.** After the applicant for this writ of habeas corpus had served more than nine years of his seventeen years' sentence, and when, under the provisions of the statute as to diminution of sentence for good conduct (Code, section 5703, which is a substantial re-enactment of the provisions of the Acts of the Eighteenth General Assembly, chapter 154, section ⁵⁷⁰ 1, which was in force when the applicant was committed), he would have been entitled to his discharge on serving for a further period of sixty-three days without any misconduct authorizing a forfeiture of the good time which he had earned or would be entitled to earn under the provisions of that statute, his sentence was suspended by the governor. The terms of the suspension were that it should remain in force during the pleasure of the chief executive, and might be revoked by said executive and the prisoner remanded for further

execution of the sentence, and that the prisoner accepted suspension with the full understanding that it might be revoked, and that "whatever allowance and rebate he may heretofore earned by reason of good conduct while incarcerated in the penitentiary will be forfeited by operation of such cation, and he will be thereupon recommitted to serve the remaining period of his original sentence, without any rebate allowance for good time heretofore earned." It was also in the order of suspension that the prisoner would be expected to abstain from the use of intoxicating liquors, and from frequenting places where intoxicants were sold or kept for sale, and in other ways so conduct himself as to justify the conclusion that the public welfare would not be endangered by the continuation of the suspension.

About two and one-half years after the prisoner had been released under this executive order, information was received at the executive office that the person whose sentence had thus been suspended was under arrest in Connecticut for the crime of assault, and that he had been conducting himself in such a manner as to justify the conclusion that the public welfare was very seriously endangered by his being at large. Without specifying the details of the information as to his conduct, it is sufficient to say that it was to the effect that he had been guilty of the grossest criminal misconduct, and was a disorderly, desperate, and dangerous person, and that, instead of complying with the specific ⁵⁷¹ requirement not to frequent places where intoxicants were sold or kept for sale, he had been engaged in the keeping and illegal sale of intoxicating liquors for which offense a warrant of arrest had been made out, but not served on account of his flight. The communication to the executive office in which this information was conveyed came from a prosecuting attorney in Connecticut, but, as the court below refused to allow this communication to be introduced as evidence, we need not further refer to it. It is sufficient to say that the governor appears to have had reasonable ground on which to base his order, issued immediately after the receipt of this communication, specifying that, for good and sufficient reasons appearing to him, the suspension of sentence was revoked; and by the order said Davis was directed to be apprehended, and returned to the warden of the penitentiary at Andover, to be confined in said penitentiary "for the whole of his unexpired term of sentence." In pursuance of this order, Davis was returned to the penitentiary, and, after serving

length of time as to more than cover the sixty-three days which he would have been required to serve had his sentence not been suspended and had he continued to pursue such a course of good conduct in the penitentiary as would have entitled him to the benefit of the statutory provisions, he brought this writ of habeas corpus to secure his release.

It is argued by counsel for the prisoner that the order of recommitment only authorized confinement for sixty-three days, but, construing the order of revocation in the light of the language used in the order of suspension, we think it was the plain intention of the governor that he should be kept in confinement for the additional period of more than seven years for which he might have been confined under the original sentence, without the benefit of the statutory provision as to good conduct; and therefore we have before us the question whether the governor, in granting a suspension of sentence to a prisoner in the penitentiary may lawfully ⁵⁷² impose as a condition to be accepted by him the requirement that, in the event of the revocation of the suspension by the governor in his discretion, the prisoner may be reimprisoned, with the penalty of a forfeiture of the diminution of his sentence which, under the statute, he would have enjoyed, had he not accepted the benefits of the suspension.

The power to grant reprieves, commutations, and pardons conferred upon the governor by the constitution, article 4, section 16, includes the power to grant a conditional pardon: *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395. And an indefinite suspension of sentence on conditions is undoubtedly, in practical effect, a conditional pardon. It was said by this court in the case just cited that "the executive may annex to a pardon any condition, precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed"; and we have no doubt that the governor may, as a condition of the continuance of the suspension of sentence, require the prisoner to abstain from acts which are not in themselves criminal, or from a course of conduct which would not in itself constitute a violation of law. There is some conflict among the authorities as to the method of procedure to be pursued when a prisoner who has availed himself of a conditional pardon has been guilty of a breach of the conditions imposed. It has been held by some courts that there must be a judicial determination of the facts amounting to a breach of the condition, and, construing the conditional pardon as a grant on a condition subsequent ⁵⁷³

view is not unreasonable: See *State v. Wolfer*, 53 Minn. 39 Am. St. Rep. 582, 54 N. W. 1065, 19 L. R. A. 783; *P. v. Moore*, 62 Mich. 496, 29 N. W. 80; *People v. Cumming* Mich. 249, 50 N. W. 310, 14 L. R. A. 285, and note; *P. v. Burns*, 77 Hun, 92, 28 N. Y. Supp. 300. It has said, however, in other cases, that the determination of facts constituting a breach of condition need not be on indictment, nor on trial by jury: *State v. Chancellor*, 1 S. 573 347, 47 Am. Dec. 557. And in some jurisdictions it has been held that the authority to determine whether the conditions of the pardon have been broken may be conferred upon the governor, who can finally determine the question of fact, and remand for further imprisonment without judicial proceedings: *Kennedy's Case*, 135 Mass. 48; *Fuller v. State*, 122 Ala. 32, 82 Am. St. Rep. 17, 26 South. 146, 45 L. R. A. 502; *State v. Smith*, 1 Bail. 283, 19 Am. Dec. 679. But the order of suspension in the case before us contained the express condition that it might be revoked at the discretion of the executive, and should remain in force only during his pleasure; it is plain, therefore, from its very terms, that no determination of any fact was essential to the authority of the governor to terminate the suspension and cause the prisoner to be returned to the penitentiary. It cannot be contended, therefore, that any judicial proceeding was necessary. This was expressly decided in *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 303, and, to the same effect, see *Woodward v. Murdock*, 124 Ind. 424, 24 N. E. 1047.

But the governor, in revoking the suspension, attempted to exercise a power reserved in the original order of suspension of forfeiting the statutory deduction for good conduct which the prisoner might have availed himself of had he not accepted the benefits of the suspension—and the question is whether, by an arrangement between the executive, granting a conditional pardon or suspension of sentence, and the prisoner, accepting the statutory privilege of diminution of sentence for good conduct while in the penitentiary can be taken away. The executive may withdraw what he has granted, and he may specify conditions on which such withdrawal shall be made, or he may make the continuance of the privilege conditional on his pleasure and discretion. But we find no authority in the statute nor in adjudicated cases for the exercise by the governor, in his discretion, of the power to deprive a prisoner of his statutory diminution of ⁵⁷⁴ sentence on account of good conduct w

in prison. It would not be claimed that the executive could stipulate, as a consequence of the revocation of the privilege granted and accepted, that the prisoner should serve a longer term than that for which he had been sentenced: *Commonwealth v. Fowler*, 4 Call (Va), 35. True, it has been held that the executive may impose the condition that the prisoner leave the state: *Ex parte Hawkins*, 61 Ark. 321, 54 Am. St. Rep. 209, 33 S. W. 106, 30 L. R. A. 736; *Ex parte Marks*, 64 Cal. 29, 49 Am. Rep. 684, 28 Pac. 109; or that the prisoner shall reimburse the state for the expenses of his prosecution by the payment of a specified sum annually for a certain number of years: *People v. March*, 125 Mich. 410, 84 Am. St. Rep. 584, 84 N. W. 472, 51 L. R. A. 461. But in no case which we have been able to find has it been attempted to compel performance by the prisoner of the obligations entered into by him in accepting the benefits of the conditional pardon or suspension. If we should sustain the enforcement of the condition in the present case, we would, in effect, sustain and enforce a contract made by the prisoner, waiving his statutory diminution of sentence. No such contract is authorized by statute, nor, as we think, is any such contract capable of enforcement. Indeed, it is only in a somewhat fictitious sense that a conditional pardon is spoken of as a contract. It is, as a matter of fact, simply the grant and acceptance of a privilege, with a condition attached, in accordance with which the privilege may be revoked: *State v. Smith*, 1 Bail. 283, 19 Am. Dec. 679; *Lee v. Murphy*, 22 Gratt. 789, 12 Am. Rep. 563; *Greathouse's Case*, 4 Saw. 487, 10 Fed. Cas. 1057.

The statutory provisions as to diminution of imprisonment for good conduct do not, perhaps, confer upon the prisoner any legal right; but, at any rate, they confer a statutory privilege of which the prisoner may avail himself. No doubt, the forfeitures provided by Code, section 5704, may be imposed by the warden without a judicial determination ⁵⁷⁵ as to the facts constituting a violation of the rules, regulations, or laws for the government of the penitentiaries. But if no such forfeiture has been declared until the prisoner has served for such length of time that, with the diminution of sentence provided for, he is entitled to his discharge, he can, without question, secure his discharge in a legal proceeding. We reach the conclusion, therefore, that the diminution of imprisonment provided for by statute is a privilege of which the prisoner can be deprived only in accordance with the provisions of the statute, and that, as no provi-

made for forfeiture of this privilege on account of violation of the terms of a conditional pardon or suspension of sentence. The executive, no such forfeiture can be imposed by the executive under any condition or stipulation inserted in the conditional pardon or order for suspension of sentence. This conclusion finds some support in the reasoning adopted by the supreme court of Indiana in deciding the case of *Woodward v. Murd*, 124 Ind. 439, 24 N. E. 1047. In that case there was, however, no express condition that on violation of the terms of his parole the prisoner should forfeit the diminution of sentence already earned by good conduct, and the court simply held that on demand after revocation of the parole the prisoner could only be required to serve such portion of his term as remained after giving him credit for such good conduct as was provided for by statute. The court, however, says: "The appellant [the prisoner] could not extend the time of his imprisonment by contract with the governor, any more than he could have become a prisoner in the first instance by contract. It is only by virtue of the judgment of a court of competent jurisdiction that a citizen can be condemned to imprisonment, and, when the term expires for which the sentence runs as given in the judgment, the prisoner is entitled to his discharge."

The judgment of the trial court was correct, and it is affirmed.

Conditional Pardons are discussed in the monographic note to *State v. McIntire*, 59 Am. Dec. 576-578. The pardoning power conferred by the constitution on a governor includes the power to grant conditional pardons, the condition to be precedent or subsequent, of any nature so long as it is not illegal, immoral or impossible performance; and a breach of the condition avoids and annuls the pardon: *Fuller v. State*, 122 Ala. 32, 82 Am. St. Rep. 17; *People v. Marsh*, 125 Mich. 410, 84 Am. St. Rep. 584; *State v. Wolfer*, 53 Minn. 135, 39 Am. St. Rep. 582; *Ex parte Hawkins*, 61 Ark. 321, 54 Am. St. Rep. 209. See, too, *People v. Adams*, 176 N. Y. 351, 98 Am. St. Rep. 675, and note. As to whether, upon a breach of the conditions of his pardon, a prisoner can be recommitted without a judicial proceeding, see *State v. Wolfer*, 53 Minn. 135, 39 Am. St. Rep. 582; *State v. Chancellor*, 1 Strob. 347, 47 Am. Dec. 557.

BANCO DE SONORA v. BANKERS' MUTUAL CASUALTY COMPANY.

[124 Iowa, 576, 100 N. W. 532.]

INSURANCE OF MAIL PACKAGES—Mailing Letter of Advice.—If one condition of a policy insuring packages sent by mail requires the mailing of the packages by being "deposited and registered at the postoffice," and another condition requires a letter of advice to the insurer to be "deposited in the postoffice at the place of mailing," this last condition is not complied with by dropping the letter in a mail-box. (p. 370.)

INSURANCE—Condition Precedent.—If the insured does not comply with a condition precedent in a policy, no contract of insurance is effected. (p. 371.)

AN ADULT is a Person who has attained the age of twenty-one years; but the statutes of Iowa modify this rule to the extent of declaring a female an adult at eighteen years of age, and all persons such upon marriage. (p. 373.)

INSURANCE OF MAIL PACKAGES—Conflict of Laws.—If a policy insuring mail packages during their transportation through specified countries is issued to a bank located in a country not specified in the policy, but the transportation by mail is initiated in one of such countries, the portion of the contract prescribing the manner of packing and sealing the property is governed by the law of the country where the bank is located. (p. 374.)

FOREIGN LAW—Who may Testify Respecting.—Under a statute authorizing proof of the unwritten law of a foreign country by parol, the testimony must be given by persons familiar with the laws of such country, or who are at least in a situation to render such knowledge probable. (p. 375.)

FOREIGN LAW.—Probably Judicial Notice should be taken of the fact that the civil law is the foundation of Mexican jurisprudence; but this extends no further than that that general system prevails, without taking notice of details. (p. 375.)

FOREIGN LAW.—The Common Law is not Presumed to be in force in any state or country where English institutions have not been established. (p. 375.)

The Bankers' Mutual Casualty Company issued a policy to the plaintiff, a bank located at Hermosillo, Mexico, June 22, 1900. P. Sandoval & Co., a partnership operating a bank at Nogales, Mexico, acted as agent of the plaintiff in making remittances to the United States, and, while so acting, put in the postoffice at Nogales, Arizona, just across the international line, a package containing Mexican currency, duly registered and addressed to the Bank of Bisbee in Arizona. On the same day this package was stolen from the mail sack. Action was brought against the casualty company to recover the loss, and the Boston Insurance Company intervened because of its obli-

gation as reinsurer. From a judgment for the plaintiff, defendant and intervener appealed.

Dale & Allen and G. W. Bowen, for the appellants.

Charles L. Powell, for the appellee.

577 LADD, J. The contract of insurance was what is known as a "running policy," in which the parties, the nature of property to be covered, and the risk to be assumed are certain but other prescribed conditions must be observed before it attaches to specific property. Among other things, it stipulates indemnity for loss of money "from the time of its deposit in registration at the postoffice . . . until delivered at the place of address to the consignees." P. Sandoval & Co., acting as agent of plaintiffs, deposited a package of Mexican currency in the postoffice at Nogales, Arizona, addressed to the Bank of Bisbee, at Bisbee, Arizona, March 21, 1900, at about 11 A. M. which was duly registered. The postmaster left the postoffice at 6 o'clock P. M., as usual, without closing the door. The partition used by the public, however, was separated by a part not reaching to the ceiling, from the apartment where the packages were kept, ⁵⁷⁸ and the door through this was fastened, as usual, also the mail pouches. Upon his return at 9 o'clock P. M. he discovered that a slit had been cut in one of these pouches and this package extracted. Was it insured? The defendant interposed involve two conditions of the policy, which must be set out:

"1. No risk to be considered as insured hereon until a package addressed to the company at Des Moines, Iowa, detailing particulars of mailing with the description of the property and amount insured, is deposited in the postoffice at the place of mailing, which must be done while the property is in good shape and in all cases prior to the departure of the mail or express which carries the property insured. . . .

"8. It is warranted by the assured that the packing and sealing of the package containing the property insured hereon shall be witnessed by two adults, one of whom shall have charge of the same until deposited and registered at the postoffice and delivered to the express company."

The packing and sealing were witnessed by A. Biester and H. Saldamando, two adults; and F. Dato, then about eight years old, carried the package to the postoffice and caused it to be registered. The evidence tended to show that the letter

prepared in compliance with the first condition at about 2 o'clock in the afternoon. Was it mailed as required before the package was stolen? Immediately across the international line from Nogales, Arizona, is a town of the same name in the state of Sonora, Mexico. The Southern Pacific Railroad runs through these places in a northerly and southerly direction, with a depot on each side of the line. At the northeast corner of that in Sonora a mail-box is maintained by the republic of Mexico, while opposite and at the southeast corner of the depot, in Arizona, is another mail-box, maintained by the government of the United States, under the supervision of the postmaster of Nogales, Arizona. The place of business of ⁵⁷⁹ Sandoval & Co. is but a short distance southeast of this, and hence the mail-box is more convenient than the postoffice building, which was three hundred and fifty yards distant. The envelope in which the letter of advice was placed in accordance with the first-quoted condition was postmarked, "Benson & Nogales, Mar. 2, 1900, R. P. O.," which indicated that it was mailed on the railroad mail car, Nogales, Arizona, at about 5:10 o'clock on the morning after the taking. In the absence of explanation, the insurance company quite naturally supposed the letter had been mailed after the loss, and repeatedly insinuated as much in its correspondence, saying it was the same. "as if a man would attempt to insure his house against fire after it had burned down." But the plaintiff introduced evidence tending to prove that Gayou, a messenger boy of the bank, deposited the letter of advice in the United States mail-box at about 5:45 o'clock in the afternoon of March 21st, and that, according to custom, the assistant to the local postmaster removed the mail from such box and handed it to the main clerk the following morning. Conscious of these facts, plaintiff—especially its agent—grew indignant over the intimations of the insurance company. Each had material information not possessed by the other, and this accounts for the unpleasant correspondence between them. The only issue submitted to the jury was whether the letter was deposited in the mail-box prior to the stealing of the package of money. The jury's finding that it was is amply supported by the evidence. But appellant insists that, even if placed in the box in time, this was not in compliance with the conditions requiring it to be deposited in the postoffice. In response, appellee first argues that this objection has been waived by defendant by exacting additional proof of loss subsequent to ascertaining the fact. Authorities to the effect that forfeiture may not

be insisted upon in such circumstances seem to be relied upon. They are not in point, for the reason that this requirement is not one relating to the conduct of parties, or the care ⁵⁸⁰ of the property during the life of the policy. It is a condition precedent to the risk attaching at all, and to be performed before the policy takes effect with respect to the property to be insured. To hold that it might be waived, as contended, would be tantamount to declaring that recovery might be had in the absence of a contract. No authority so holding is cited, and we are confident none can be found.

Was dropping the letter in the mail-box depositing it "in the postoffice at the place of mailing," within the meaning of the first condition of the policy? In the statutes of the United States the word "postoffice" has a well-defined meaning: U. S. Rev. Stats., sec. 3829 et seq.; U. S. Comp. Stats. 1901, p. 2608. The postmaster general is required to establish postoffices at such places on post roads as he may deem expedient, and the postmaster is to be placed in charge of each postoffice. As contemplated in these statutes, and in the sense in which the word is ordinarily used, "postoffice" is the room or building where the local business of the postal department is conducted. The Webster defines it as "an office under governmental superintendence, where letters, papers, and other mailable matters are received and distributed; a place appointed for attending to a business connected with the mail." That the word was employed in this sense appears from a comparison of the first and eighth clauses of the contract, and in the fair construction of the former. The first condition requires the letter of advice to be "deposited in the postoffice at the place of mailing," and the second exacts the mailing of the package by being "deposited and registered at the postoffice." In other words, the letter of advice may not be deposited in the postoffice of some place other than that of the village, town or city where the package is registered. The language employed also indicates that it was intended to distinguish between the mere matter of mailing the letter and the place where mailed, for it is expressly required not that it be mailed or placed in the United States mails, but that it be ⁵⁸¹ deposited at a particular place, to wit, the postoffice in the locality where the package has been mailed. In view of this language, we do not feel at liberty to say that the deposit in the mails generally was intended. True, the mail box was shown to have been under the control and supervision of the postmaster, and letters and parcels mailed in it, though not carried to the postoffice, passed into his custody as con-

pletely as though left at the building occupied as a postoffice. But this cannot be held to constitute a mere receiving box three hundred and fifty yards from the building occupied by the postmaster, without physical connection therewith, a part of the postoffice itself. It was still a mail-box, and not a postoffice. Otherwise boxes miles away may be appropriately so declared, and the deposit of letters in any of the mail-boxes in a city having the free delivery system must be construed to be depositing in the postoffice. These may be under a separate bureau of the general government, as contended, but the mails are gathered therefrom at stated periods, as in the instant case, and carried to the postoffice for distribution. In a general sense—for instance, as used in the constitution, authorizing Congress to establish postoffices and post roads—the entire system of forwarding mails may be regarded as the postoffice, and in this sense I was of opinion on the former submission that the words as employed in the contract might be construed. But the condition in the contract has reference to a particular postoffice at the place of mailing of the package, and therefore the designation could not have been intended to have reference to the general system. A very good reason for exacting the mailing of the letter of advice in the postoffice is that thereby prompt postmarking is secured, and the company advised therefrom of the place where deposited, and approximately of the time when its policies attach. Thus the postoffice at Nogales was furnished by the government with a stamp indicating the hours of the day when mail was received; and, had this letter been deposited in the postoffice, ⁵⁸² instead of the box, it would, in all probability, have borne a postmark stating when received—indicating that it had been mailed before 6 o'clock P. M. of March 21st, and therefore before the robbery, which occurred shortly after 6. It would also have shown that it was mailed at Nogales, instead of at any point between that place and Benson, Arizona. The company had the right to so frame its contract as to be able to avail itself of such evidence. This did not prevent dropping letters in the postoffice after closing time, but it provided proof thereof by the appearance of the postmark dated the following morning. Such evidence may not be infallible, but no argument is required to demonstrate that it might prove exceedingly helpful to the insurer in the investigation of losses.

It is said, however, that the defendant, by putting a different construction on the contract, waived that we have given it, and elected to base its defense on another ground. It is true that

in certain letters and blanks the insurer referred to the mailing of the letter before or after the robbery, but the manner of mailing was not mentioned. It is not questioned but that the letter had been deposited in the mails. The first proofs of loss represented that it had been mailed as required by the policy, and the correspondence shows conclusively that the defendant was insisting all along that the contract had not attached, owing to the failure to mail the letter of advice in accordance with the first condition, and we have not found anything in the record indicating an intention of treating the deposit in the mail-box as a compliance therewith.

Some reliance is placed on section 1743 of the Code, providing, in substance, that the violation of any condition or stipulation rendering a policy void, before loss, shall not defeat recovery, if it is made to appear that the omission to observe such condition or stipulation did not contribute to the loss. This section has no application, for that, by not complying with the condition precedent, no contract of ⁵⁸³ insurance was effected, and hence there was no condition or stipulation to be violated.

2. By the eighth clause the money package is warranted to the insured to have been packed and sealed by two adults, one of whom continued in control until deposited in the postoffice. As the parties have made this a condition of the contract, they are not to inquire into its materiality. It is enough that the court made it material: *Stewart v. Equitable Life Assn.*, 110 Iowa 528, 81 N. W. 782; *Nelson v. Nederland Life Ins. Co.*, 110 Iowa 600, 81 N. W. 807. While two adults witnessed the packing and sealing of the money, Dato, who was also present, carried the package to the postmaster, and had it registered. He was seventeen years old, his next birthday being July 13, 1900, and on the way or at the building he met Gaxiola, a boy of sixteen years. Dato claims merely to have answered Gaxiola's question as to what was in the package, while Gaxiola testified that this information, together with the statement of the amount, was volunteered to him and one Henderson; that the latter climbed over the partition heretofore mentioned, and extracted the package from the mail sack, shortly after 6 o'clock P. M., and subsequently shared its contents with him. It may be, as argued by appellant, that this illustrates the reason for exacting the performance of duty, or of packing and delivering the money to the government by adults, because of the greater prudence. It is to be observed, however, that no condition of the policy imposes silence on one properly selected

carry the money. But was Dato an adult? At common law, according to Blackstone: "A male at the age of twelve years may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion can be actually proved, may make his testament of personal estate; at seventeen may be an executor; and at twenty-one is at his own disposal, and may alien his lands, goods, and chattels. A female also at seven years of age may ⁵⁸⁴ be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of discretion, and may choose a guardian, at seventeen may be an executrix; and at twenty-one may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law." Thereafter they are adults. And this is the conclusion of the lexicographers and the courts generally concerning the term in its legal acceptation. Thus the court of appeals of Texas, in *Schenault v. State*, 10 Tex. App. 410, and numerous cases since, has defined the word to be a person who has attained the full age of twenty-one years: See, also, Code, sec. 3188. The common law is modified by statute to the extent of declaring a female an adult at eighteen years of age, and all persons such upon marriage.

But the policy was issued to the plaintiff, a corporation located in the state of Sonora, in the republic of Mexico. The application therefor was mailed from Hermosillo, Mexico, and in response the policy was executed and mailed to plaintiff at that place. It is conditioned "to cover shipments by the registered mail or by express within the United States, or between the United States and the dominion of Canada, kingdom of Great Britain and Ireland or the continent of Europe." This package was merely registered from one point in the territory of Arizona to another, and, in the absence of any showing to the contrary, its laws, as contended, are to be presumed like those of Iowa. There is nothing in the contract, however, requiring the money to be packed and sealed in any of the countries named, and the fact that the policy was issued to a bank in Mexico indicates that this was to be done there. Naturally, the money would be prepared for ⁵⁸⁵ transportation before re-

removal from the place where kept. This must have been with the contemplation of the parties in making the contract. Manifestly, the object was to provide indemnity for loss between points in the countries enumerated in transporting funds for the plaintiff bank. The thought, then, was that the money would be prepared for shipment in Mexico. This portion of the contract was to be there performed, and in this respect is well settled that the laws of the locus in quo govern. "Matters bearing upon the execution, the interpretation, and validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of the evidence, statutes of limitation, depend upon the law of the place where the suit is brought": *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245. To the same effect, see *Wharton on Conflict of Laws*, secs. 201, 433 et seq.; *Minor on Conflict of Laws*, sec. 186. In the absence of anything indicating the contrary, the parties are presumed to have in mind, for the purpose of performance, the law and usage of the place where this is to be done. This particular part of the contract was to be performed at the initial point by the plaintiff, and there is no reason for thinking the parties intended otherwise than the laws of Mexico should control. Frequently different parts of an arrangement are to be carried out in different localities, and ordinarily in such cases the law of each place is applicable to the doing of each part: *Minor on Conflict of Laws*, sec. 160. As, then, the money was intended to be packed and sealed in Mexico, and the persons doing this were to be adults, they were required to be adults under the law of that country.

The plaintiff pleaded that the "civil law, in distinction from the common law, is the foundation of the laws of Mexico. It called as witness an attorney who testified, in substance, that he was not acquainted with the laws of the Republic of Mexico, nor of the state of Sonora, but that he had been a student of history of law and government, and, from his studies, knew in a general way the countries having a civil law or a Justinian Code as the basis of their jurisprudence, that Mexico was one of these; that the country had a constitution and statutory laws in system like those of the United States; and that Bouvier's Law Dictionary is accepted authority on legal definitions. The parts of this dictionary stating

the civil law is the foundation of the law of Mexico and certain other countries, and that an "adult, under the civil law, is a male infant who has attained the age of fourteen years, was introduced in evidence. All this evidence was received over the defendant's objection. That concerning the dictionary and its definition of an adult under the civil law was rightly admitted. Otherwise the witness did not show himself competent to testify. No evidence of the written law was introduced. The statute authorizes proof of the unwritten law of a foreign country by parol: Code, sec. 4657; *Crafts v. Clark*, 38 Iowa, 237. But this must be given by persons familiar with the laws of such country, or who are at least in a situation rendering such knowledge probable: *Watson v. Walker*, 23 N. H. 471; *American Life Ins. etc. Co. v. Rosenangle*, 77 Pa. St. 507; *Greasons v. Davis*, 9 Iowa, 219.

As to whether the civil law is the foundation of Mexican jurisprudence, the histories are quite as accessible to the court as to the witnesses. Probably judicial notice should be taken of the fact as a matter of history. But this extends no further than that the general system of jurisprudence prevails, without taking notice of details. The extent of its adoption we are not bound to know, for, in its adjustment to the situation and conditions of a people on this continent, doubtless many changes were made. Was the entire body of the Justinian Code adopted? Or this with modifications essential to meet the necessities and ⁵⁸⁷ demands of modern civilization? This was a matter for specific proof with respect to the particular issue. We know that Mexico was a Spanish province for about three hundred years, and then became, and still is, a republic. At no period of its history has it been under British sovereignty. Its institutions are Latin, and not Anglo-Saxon, and the common law is not presumed to be in force in any state or country where English institutions have not been established: *Savage v. O'Neil*, 44 N. Y. 298; *Davison v. Gibson*, 56 Fed. 443, 5 C. C. A. 543; *Norris v. Harris*, 15 Cal. 252; *Flato v. Mulhall*, 72 Mo. 522; *Brown v. Wright*, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467; 13 Am. & Eng. Ency. of Law, 1065.

The appellee urges that the objection to the nonage of Dato was waived, and there is much to be said in favor of this proposition. But as what we have said will in all probability terminate the case, it is unnecessary to pass on that issue.

Reversed.

Bishop, J., took no part.

Street Letter-boxes and street delivery are, according to Wood v. Callaghan, 61 Mich. 402, 1 Am. St. Rep. 597, legal parts of the postoffice system, and a letter deposited in one of these boxes may be considered as being delivered or mailed at the postoffice: See, Casco Nat. Bank v. Shaw, 79 Me. 376, 1 Am. St. Rep. 319.

The Law of the Place of Performance usually governs the interpretation and validity of a contract: See Swedish-American Nat. Bank v. First Nat. Bank, 89 Minn. 98, 99 Am. St. Rep. 549, and cases cited in the cross-reference note thereto.

Courts do not Take Judicial Notice of the laws of foreign countries (Holloway v. Memphis etc. R. R. Co., 23 Tex. 465, 76 Am. Dec. 577; Kohn v. Schooner Renaissance, 5 La. Ann. 525, 52 Am. Dec. 577; State v. Twitty, 11 Am. Dec. 781-783), nor of the statutes of sister states: Murtey v. Allen, 71 Vt. 377, 76 Am. St. Rep. 779; Myer v. Chicago etc. Ry. Co., 69 Minn. 476, 65 Am. St. Rep. 579.

The Common Law is Presumed to prevail in states judicially known to be of common-law origin: Birmingham Water Works Co. v. Hughes, 121 Ala. 168, 77 Am. St. Rep. 43. See, too, Estate of Harrington, Cal. 244, 98 Am. St. Rep. 51; Mittenthal v. Mascagni, 183 Mass. 97 Am. St. Rep. 404. But it is not presumed to exist in Louisiana: Peet v. Hatcher, 112 Ala. 514, 57 Am. St. Rep. 45.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

**WILLIAMS v. METROPOLITAN STREET RAILWAY
COMPANY.**

[68 Kan. 17, 74 Pac. 600.]

LIMITATION OF ACTIONS—"Out of the State."—One retaining a residence in the state at which process against him may be served must, nevertheless, be regarded as "out of the state" within the meaning of those words as used in the statute of limitations. (p. 378.)

STATUTE OF LIMITATIONS—"Out of the State."—A foreign corporation, though it has agents and does business within the state and a valid judgment might be entered against it on service of process on such agents therein, must be regarded as "out of the state" within the meaning of a statute providing that if, when a cause of action accrues against a person, he is out of the state, the period limited for the commencement of the action shall not begin to run until he comes into the state. (p. 382.)

Action commenced June 1, 1901, to recover for personal injuries suffered by the plaintiff on July 15, 1894, from the negligent starting of a passenger-car of the defendant by its employes while she was alighting therefrom. The defendant was a corporation organized under the laws of Missouri, having its principal place of business in Jackson county in that state, where the members of its board of directors and its president, vice-president, secretary, treasurer and general superintendent resided and had their offices. It engaged in carrying passengers from Kansas City, Missouri, in and through Kansas City and other towns in the state of Kansas. About one-third of its business was transacted in the latter state, and it there operated more than fifteen miles of street railway, and owned and occupied the requisite car barns and offices. Judgment was entered favor of the defendant in the trial court on the ground that

the plaintiff's action was barred by the statute of limitations referred to in the opinion of the supreme court.

Getty, Hutchings & Dean, for the plaintiff in error.

Miller, Buchan & Morris, for the defendant in error.

²⁰ SMITH, J. The sole question involved is whether foreign corporation transacting business in this state can plead the statute of limitations in bar of a cause of action originating here in favor of a resident plaintiff. The statutory language applicable to the case is as follows: "If, when a cause of action accrues against a person, he be out of the state, . . . the period limited for the commencement of the action shall not begin to run until he comes into the state, . . . and if after the cause of action accrues he depart from this state, . . . the time of his absence . . . shall not be computed as any part of the period within which the action must be brought": Gen. Stats. 1901, sec. 4449. By the thirteenth paragraph of section 7342 it is ²¹ provided that the word "person" may be extended to corporate bodies.

It is the contention of counsel for defendant in error that because, at the time of the injury to plaintiff below, the street railway company was doing business in Kansas, and had a superintendent here on whom process could be served, and so continued to transact business and maintain an office in this state until the action was begun, for the purpose of invoking the bar of the statute of limitations, it cannot be held that the corporation was out of the state during said time.

In *Lane v. National Bank of the Metropolis*, 6 Kan. 74, was held that the personal absence of the debtor from the state, even if he retained a residence here at which process against him might be served, was sufficient to take the case out of the statute. This case has been followed repeatedly: *Hoggett v. Emerson*, 8 Kan. 262; *Morrell v. Ingle*, 23 Kan. 32; *Conlon v. Lanphear*, 37 Kan. 431, 15 Pac. 600; *Ament v. Lowenthal*, 52 Kan. 706, 35 Pac. 804; *Coale v. Campbell*, 58 Kan. 480, 48 Pac. 604; *Investment etc. Co. v. Berghold*, 60 Kan. 813, 49 Pac. 469.

In the early case of *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. ed. 274, Chief Justice Taney said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only by the sanction of law, and by force of the law; and where th

law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

Counsel for the street railway company are in error when they assert that this case has been overruled by *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354, 27 L. ed. 222. The last decision went no further than to ²² hold that an Illinois corporation could not be subject to a judgment in personam in Michigan unless at the time of service of summons it was doing business in the latter state.

In *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 450, 12 Sup. Ct. Rep. 935, 937, 36 L. ed. 768, Mr. Justice Gray, after quoting the above language of Chief Justice Taney, said: "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it."

In the same opinion the words of Mr. Justice Curtis in *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451, are approved. He said: "This corporation, existing only by virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that state": See 1 Clark & Marshall on Private Corporations, 356.

In *Land Grant Ry. v. Commissioners of Coffey County*, 6 Kan. 245, 253, Mr. Justice Valentine, speaking for the court, said: "A corporation, in order to have any legal or valid existence, must have a home, a domicile, a principal place of doing business, within the boundaries of the state which creates it. It may send agents into other states to do business, but it cannot migrate in a body. If it attempts to migrate in a body, to go beyond the jurisdiction of the laws which bind and hold it together, it dissolves into its original elements, and the persons who comprise it become only individuals. And even where a corporation has a legal and valid existence in its own state, the only recognition that ²³ other states will give to it is such as the rules of courtesy and comity between states require."

The corporation sued in this action, like all others, is, in the words of Chief Justice Marshall, "an artificial being, invisible, intangible, and existing only in contemplation of law." In *State v. Topeka Water Co.*, 61 Kan. 547, 558, 60 Pac. 337, 34¹ it was said: "A corporation exists by the will of a sovereign

power. To this superior authority it owes an allegiance which it cannot abjure."

If the Metropolitan Street Railway Company was, in contemplation of law, present in this state from May, 1894, until June, 1901, then the action was barred. The corporation was sued. It is not contended that the body corporate moved into this state, but that, having agents here, their presence while transacting business in its behalf, amounted to the presence of the corporation itself, within the meaning of the statute of limitations above set out. If, as stated by Chief Justice Taney, a corporation cannot migrate from one state to another, then the intangible body which was sued in this action was all times absent from this state and present in the state of Missouri. In *Tioga R. R. Co. v. Blossburg etc. R. R. Co.*, 2 Wall. 137, 149, 22 L. ed. 381, Mr. Justice Hunt said: "We do not say that a corporation cannot run its cars in a state other than that where it is incorporated and where it is domiciled, nor that it cannot by its lawful agents make contracts and conduct other business in such state. We assume that it can. In doing these things it does not lose its residence in the former state nor become a resident of the latter. It still resides in the state where it is incorporated and does not depart therefrom."

The language above quoted was used when the ²⁴ court was considering the effect of a section of the New York statute of limitations exactly like ours. It is true, as counsel state, that in the case last referred to it was held by a majority of the court that in New York no personal judgment can be obtained against a foreign corporation by service on its officers or agents although it may be doing business in that state. We do not conclude, however, that a different result would have been reached had the law there permitted a valid personal judgment to be rendered, based on service on the corporation's agents in New York. In the brief of counsel for the street railway company it was said: "The full object and purpose of our law has been subserved when a plaintiff for the full period of limitation has been in a position to sue upon his claim and recover a personal judgment against the defendant."

The same argument was made in behalf of Senator Lane, in *Lane v. National Bank of the Metropolis*, 6 Kan. 74, who maintained a residence in Lawrence, in this state, where personal judgment could have been had by leaving a copy of the summons at the bank, under section 64 of the code (Gen. Stats. 1901, sec. 4494), and a personal judgment obtained thereon, which would be good

everywhere. The court, however, held that the statute of limitations which excludes the time during which the debtor is absent from the state should receive the natural meaning the words used import. The plaintiff in the Lane case was nowise obstructed or delayed in bringing his action by the absence of the debtor in Washington, for during the whole time of such absence he could have obtained service of summons as valid in all respects as if had personally on Mr. Lane in this state.

The case of *North Missouri Ry. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183, was an action against a Missouri railroad corporation for breach of contract. The latter ²⁵ pleaded the statute of limitations. The court said, at page 475: "The reply to the plea of the statute of limitations was that the defendant was a foreign corporation, created and existing under the laws of Missouri, and having no corporate existence under the laws of Kansas. And there was testimony absolutely proving these allegations. So that the assumption of fact in the instruction is hardly sustained by the record. But we have already attempted to show that a corporation is a person under the code and within the meaning of section 28—an artificial being, a corporate body, confined to the state of Missouri, where it remained until this suit was brought, for aught that appears from the record, and is subject to the exceptions enumerated in section 28 of the code. To hold otherwise would be to say that the legislature intended to discriminate in favor of a foreign corporation, without any just grounds for such a conclusion. We think the principle of this instruction was settled by the court in the case of *Bonifant v. Doniphan*, 3 Kan. 35, and against the plaintiff in error."

There was no showing, however, in the case referred to that the foreign corporation had at any time transacted business in this state. The court based its decision on the authority of *Bonifant v. Doniphan*, 3 Kan. 26, which first adopted the construction of the limitation statute afterward adhered to in the Lane case and others cited above. It will be noted that the court applied the language of section 4449 of the present statute, *supra*, to an artificial being—a corporate body—and gave it the same effect as if an absent individual were defendant in the action. The same application of the statute was made in *Aetna Life Ins. Co. v. Koons*, 26 Kan. 215, the third paragraph of the syllabus reading: "Where the petition alleges that the defendant is a foreign insurance corporation, created and existing ²⁶ under the laws of Connecticut, with its principal office

in the city of Hartford, in that state, it sufficiently appears therefrom that the defendant is a nonresident, and not present in the state, and an objection upon the ground that the cause of action therein set forth is barred by the statute of limitation is not well taken, because the exceptions enumerated in section 21 of the code apply."

A corporation must be thought of without reference to the members who compose it. The latter may die, but the body corporate does not. While a valid judgment may be taken against a corporation in this state by service here on its officers or agents transacting business for it, yet such fact does not compel us to hold that, within the meaning of our limitation law, it is personally present in the state when served. In the case of *Senator Lane* a valid personal judgment could have been obtained against him by his creditor by service of summons left at his usual place of residence in Kansas, although at the time he was temporarily absent in Washington in discharge of his official duties. In *Foster etc. Co. v. Caskey*, 66 Kan. 600, 70 Pac. 268, it was held that, although the principal business of a foreign corporation was transacted in this state, such fact did not authorize the taxation of its capital stock here. The case of *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119, 146, was quoted: "The domicile of the Standard Oil Company is in the state of Ohio. Being a corporation, it is an invisible, artificial and intangible thing. When it sent its agents to this state to transact business, it no more entered the state in point of fact than any other foreign corporation, firm or individual who sends an agent here to open an office or branch house."

Wisconsin has a limitation statute like ours. The clause relevant here reads: "If, when the cause of action shall accrue against ²⁷ any person, he shall be out of this state, such action may be commenced within the terms respectively limited (six years) after such person shall return or remove to this state."

This provision was held to apply to the temporary absence of a resident of the state, although during such absence a summons might have been served by leaving it at his usual place of abode: *Parker v. Kelly*, 61 Wis. 552, 555, 21 N. W. 539. Following this, in *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 286, 39 Am. St. Rep. 893, 56 N. W. 915, it was decided that a foreign corporation came within the purview of the limitation above quoted. The court said that the word "person" is applicable to corporations as well as to individuals, it was held that when the cause of action accrued the corporation

was "out of the state." In *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 377, 74 N. W. 372, 78 N. W. 407, 41 L. R. A. 557, the case of *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 39 Am. St. Rep. 893, 56 N. W. 915, was followed. On a motion for rehearing it was said: "The appellant argued that . . . a foreign corporation which has acquired a domicile in this state for the purposes of litigation is not a nonresident in such sense as to suspend the operation of the statute of limitations against it: 6 Thompson on Corporations, sec. 7841. The motion was denied."

In most of the cases cited by counsel for defendant in error the right of a foreign corporation to plead the statute of limitations is made to depend on whether valid service could be had on it in the state where sued: *Winney v. Sandwich Mfg. Co.*, 86 Iowa, 608, 53 N. W. 421, 18 L. R. A. 524; *Turcott v. Railroad*, 101 Tenn. 102, 70 Am. St. Rep. 661, 45 S. W. 1067, 40 L. R. A. 768. As we have shown, such is not the test in this state. ²⁸ The last case cited expressly recognizes that the doctrine contended for by defendant in error does not obtain in Kansas. It may be said that a foreign corporation doing business in this state through agents is constructively present here for the purpose of valid service of summons on it although it is actually out of the state: *Merchants' Mfg. Co. v. Grand Trunk Ry. Co.*, 13 Fed. 358. The constructive presence of Senator Lane in Kansas at his place of abode in Lawrence where valid service might have been had, did not avail him during his actual absence from the state.

An examination of the decisions of different states on the subject in hand will disclose that in almost all of them, where it has been held that a foreign corporation situated like defendant in error may invoke the limitation laws of the jurisdiction where it is sued, statutory provisions differing from ours exist. A notable exception, however, is found in Nebraska, where under a statute like section 4449 of the General Statutes of 1901, *supra*, the doctrine of the Lane case and others cited above is denied. In *Bauserman v. Blunt*, 147 U. S. 647, 657, 13 Sup. Ct. Rep. 466, 470, 37 L. ed. 316, the court said: "But what may be the law of Nebraska is immaterial. The case at bar is governed by the law of Kansas, and the duty of this court to follow as a rule of decision the settled construction by the highest court of Kansas of a statute of that state is not affected by the adoption of a different construction of a similar statute in Nebraska or in any other state."

On the question involved see, also, *Boardman v. Lake Shore etc. Ry. Co.*, 84 N. Y. 157, and cases cited; *State v. National Acc. Soc. of New York*, 103 Wis. 208, 79 N. W. 220; *Hatchett v. Blair*, 100 Fed. 817, 41 C. C. A. 76; *Barstow v. Union etc. Co.*, 10 Nev. 386; *Clarke v. Bank of Mississippi*, 10 Ar. 516, 52 Am. Dec. 248.

Whether foreign corporations which have purchased or leased railroads in this state, as provided in section 5871 of the General Statutes of 1901, are affected by the principle involved in this case, we do not decide.

The judgment of the court below will be reversed and the cause remanded for a new trial.

All the justices concurring.

Whether a Foreign Corporation doing business within a state "out of the state," within the meaning of such words when used in a statute of limitations, is discussed in the notes to *Clarke v. Bank of Mississippi*, 52 Am. Dec. 256, 257; *Moore v. Armstrong*, 52 Am. Dec. 73; and the subsequent case of *Turcott v. Railroad*, 102 Tenn. 102, 70 Am. St. Rep. 661.

CITY OF HUTCHINSON v. LEIMBACH.

[68 Kan. 37, 74 Pac. 598.]

CONSTITUTIONAL LAW—Delegation of Legislative Authority to Exclude Territory from a City.—A statute providing that whenever it shall be desired to exclude any lot or block or any unplatted farm from the boundaries of any city, the persons so desiring shall give notice in the manner specified that a petition will be presented to the district court for such exclusion, and that such court, upon presentation of such petition, must hear testimony, and if satisfied therefrom that due notice has been given and that no public right will be injured or endangered, must order the corporate boundaries to be changed by such exclusion, is unconstitutional, because it, in effect, delegates to the petitioners the legislative power to determine the boundaries of the municipal corporation in question. (p. 38)

A. C. Malloy, for the plaintiff in error.

W. G. Fairchild, for the defendants in error.

38 MASON, J. This was an action brought to enjoin the collection of city taxes upon real property which at one time was within the city of Hutchinson, but which the owners claim has been legally taken out of the corporation. The district

court granted the injunction and the city brings the matter here for review. The proceedings for placing the land outside the corporate limits were had under chapter 267 of the Laws of 1897 (Gen. Stats. 1901, secs. 7894-7903), and the contention of the city is that this statute is void because it attempts an unconstitutional delegation of legislative authority. Defendants in error claim that the statute has been upheld repeatedly by this court against this objection. This, in a sense, is true, but a review of the authorities will discover that the case presents a question to which heretofore the attention of the court has not been directed specifically.

The first case directly involving any feature of the question was the *City of Emporia v. Smith*, 42 Kan. 433, 22 Pac. 616, which arose under section 1 of chapter 69 of the Laws of 1886 (Gen. Stats. 1901, sec. 1052), but in which it was merely decided that the power given to the legislature by section 21 of article 2 of the Kansas constitution, to confer on the tribunals transacting county business powers of local legislation and administration, is not exclusive, but that such powers with reference to the change of city boundaries might be conferred on the mayor and councilmen.

The next case was *Callen v. Junction City*, 43 Kan. 39 627, 23 Pac. 652, 7 L. R. A. 736. This arose under the same statute, which reads as follows: "That whenever the city council of any city of the second class desire to enlarge the limits thereof from the territory adjacent thereto, said council shall, in the name of said city, present a petition to the judge of the district court of the county in which such city is situated, setting forth by metes and bounds the territory sought to be added, and asking said judge to make a finding as to the advisability of adding said territory to said city. Upon such petition being presented to said judge, with proof that notice of the time and place said petition shall be so presented has been published for three consecutive weeks in some newspaper published in said city, he shall proceed to hear testimony as to the advisability of making such addition; and upon such hearing, if he shall be satisfied that the adding of such territory to the city will be to its interest, and will cause no manifest injury to the persons owning real estate in the territory sought to be so added, he shall so find; and thereupon the city council of said city may add such territory to said city by an ordinance providing for the same; providing, that no such proceeding shall be necessary where the territory sought to be added is subd

vided into lots and blocks, but in such cases the city council or such city shall have power to add such adjacent territory to said city by ordinance."

It was urged that the statute was void inasmuch as it attempted to confer legislative powers upon a judicial officer. The opinion reviewed at length the conflicting authorities bearing on the question and upheld the statute on the theory that the legislative power to determine, as a matter of policy, whether a tract of land should be added to the city was conferred by it upon the mayor and council, under the restrictions that it should not be exercised in any case where it would not be to the interest of the city, or where a manifest injury would be caused to property owners,⁴⁰ and that whether these conditions existed was a judicial question, properly left to the determination of the district court. The principle is that while the court may be said to decide whether a change ought to be made the council determines whether it shall be made. The legislative fiat proceeds from the council and not from the court.

The next cases were *Huling v. City of Topeka*, 44 Kan. 57, 24 Pac. 1110, and *Hurla v. Kansas City*, 46 Kan. 738, 27 Pac. 143, arising under section 1 of chapter 99 of the Laws of 1888 (Gen. Stats. 1901, sec. 724), which is similar to the section quoted but applies to cities of the first class, and the action of the court is made to follow, instead of precede, that of the council. The part directly in point reads as follows: "Thereupon said court shall determine whether said publication has been made as herein required, and shall then consider said ordinance, and by its judgment either approve, disapprove or modify the same, first hearing all objections, if any, and proofs, if any, offered by said city or persons affected by said ordinance. Should said ordinance be approved or modified by said court then the limits or area of said city shall be enlarged or extended as therein designated, from the date of such approval or modification; but should it be disapproved entirely, then the limits or area of the city shall remain unaffected by said proceedings; but should the same be approved entirely, or modified and approved, the judgment of said court shall stand, and the limits of such city shall be extended as is in said judgment specified."

In each case it was held, following the decision in *Callen Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736, that the power conferred on the court was judicial, not legislative.

Among other cases which also follow the *Junction City* case are *City of Emporia v. Randolph*, 56 Kan. 117, 42 Pac. 37.

and Eskridge v. Emporia, 63 Kan. 368, 65 ⁴¹ Pac. 694, although in the former case Mr. Justice Allen dissented, and Chief Justice Martin, who wrote the opinion, stated that if the question had been a new one he would have taken the other view.

It should be observed that all of these cases are based upon statutes authorizing changes of boundary to be made by the mayor and council, subject to certain findings made by the court. But the statute involved in the present action is very different. So far as it is here material it reads as follows (Gen. Stats. 1901, secs. 7896, 7897, 7899, 7900):

"Sec. 7896. Whenever it shall be desired to vacate any block, lot, park, reservation, street or alley, or any part of such block, park, reservation, street or alley, in any improved town-site, or exclude the same, or any unplatted farm land from the boundaries of any city of the first, second or third classes, the person, persons or corporation so desiring shall give notice by advertisement for four consecutive weeks in a weekly newspaper of general circulation in said town, and published in the county in which said lots, blocks and parks are situated, that at the next regular session of the district court of the county in which such town is located a petition will be presented to the said district court praying the vacation of such block, lot, park, reservation, street, alley, or any part of such block, park, street or alley, and the exclusion of unplatted farm land from such corporate boundaries, describing the same properly.

"Sec. 7897. Upon the presentation of such petition the court shall hear such testimony as is produced before it, and such other testimony as it may wish to hear; and if upon the hearing of such testimony the court is satisfied that due notice has been given as required by this act, and that no public or private right will be injured or endangered, it shall order such street, alley, or other public reservation, or any portion or portions thereof, describing the same, to be vacated, or such corporate boundaries to be changed by the exclusion ⁴² of such lands therefrom, by an order entered upon the journal of such proceedings. . . . And in case of an order changing such city boundaries, shall certify the same to the mayor and council of such cities, who shall thereupon, by proper ordinance, record such change."

"Sec. 7899. Any party to any proceeding herein shall have the right to have any matters of fact in controversy in said proceedings submitted to the determination of a jury in the district court of the county where the property is situate.

"Sec. 7900. That the terms 'public loss or inconvenience' or 'public right,' shall not be construed to extend to the tax which may be levied upon the land vacated or excluded."

It will be seen that the power to determine whether the loss involved shall be taken out of the city, unless it may be determined to be conferred upon the court, is not conferred upon the council or any public body or officer, but upon the petitioners, who are not in terms required even to be residents upon, or owners of, the tracts affected. But under the reasoning of the court already referred to the court is not given, nor could it be fully be given, the power to change the corporate boundaries. The only matters left to its determination (or to that of a jury, if any party so desire) are the questions whether due notice has been given and whether any private or public right will be injured or endangered by the proposed change.

This statute was first before the court in *Brook v. H. Mound*, 61 Kan. 184, 59 Pac. 273, but the only attack made upon its validity related to the title, which was held sufficient. It was again considered in *In re Robinson*, 62 Kan. 426, 63 Pac. 426, where it was held that the findings of the jury were binding on the court, and that a petition under the act cannot be denied on account of the rights of holders of city bonds being endangered by granting it, or on account of loss of taxes to the city. No other question was discussed in the opinion, which criticised the meager presentation of the law made by counsel on both sides. In *City of Winfield v. Lynn* (Kan.), 57 Pac. 549 (not officially reported), the constitutionality of the statute was again affirmed by this court, without extended discussion, and upon the assumption that it was within the doctrine of *Callen v. Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736.

The precise question here involved, therefore, seems not to have been considered in any of the cases cited. It is this: Is it competent for the legislature to authorize an individual to effect a change in the boundaries of a city, provided that, after publishing notice of his intention to do so, he can induce a jury in the district court to find that no public or private right will be endangered, the loss of taxes to the city and of security to its bondholders being excluded from consideration? In cases arising under the statutes authorizing the mayor and council to change the city boundaries, subject to conditions determined by the court, the doubtful question was whether legislative power was thereby conferred upon the court, and

it was authorized to pass upon the expediency of the proposed measure. But here there is no such question. Under the statute now involved the court has no discretion; it examines but one question—whether the proposed change would injure or endanger public or private rights, leaving out of consideration any possible right of the city or its bondholders to look to the property affected for taxes, and if this is answered in the negative it must register the will of the petitioner, just as the council is in express terms required to record it by ordinance. The ⁴⁴ legislative power is not devolved upon the court, but upon the individuals seeking the change.

In *Commissioners of Wyandotte Co. v. Abbott*, 52 Kan. 148, 34 Pac. 416, a statute requiring the improvement of a public road to be made when petitioned for by a certain number of individuals was held void on the ground that it sought to vest legislative powers in the petitioners. While Mr. Justice Johnston dissented, the dissent was based upon the grounds that the statute really left to the county commissioners the final decision as to whether the improvement should be made, a construction not accepted in the majority opinion, and that the petitioners exercised no legislative power. We think the principle of that case reaches the facts of this, and are constrained to hold that for the reason indicated the act of 1897 is unconstitutional, so far as it attempts to authorize territory to be taken from the city upon the petition of individuals, subject only to the findings of fact for which it provides.

If the statute had prescribed affirmative conditions upon which owners might have their lands disconnected from the city as a matter of right, the existence of the conditions to be passed upon by the court, a very different question would be presented. For instance, if its provisions were that any unplatted farm land lying in a city should be excluded from the corporate boundaries on petition of the owner whenever its character as such should be shown in appropriate proceedings in the district court, it might be considered that the legislature had itself determined that such land ought not to be included within the limits of a city because of its character, and so, in effect, made its retention unlawful, and afforded means by which the owner might procure an authoritative ⁴⁵ declaration to that effect, the judicial determination merely establishing that the legislative enactment applied to his property. But such is not the effect of the statute, although some of its language might so indicate. The affirmative provisions are that "whenever it

shall be desired to vacate any block, lot, park, reservation, street or alley, or any part of such block, park, reservation, street or alley, in any improved townsite, or exclude the same, or any unplatted farm land from the boundaries of any city," a petition shall be presented and notice given, and if certain findings are made the court shall order the "corporate boundaries to be changed by the exclusion of such lands therefrom." In the present case the property in question is shown to be farm land, but this is not material, since the statute does not make it so; and in view of this fact the reasoning suggested as applicable under a different statute—a statute making the change of boundary dependent upon the character of the property affected—cannot be applied here.

True, the present act provides for detaching only tracts as to which a finding shall be made which is in form affirmative—that the change will not endanger rights other than those relating to taxes. But this attribute is essentially negative. It does not serve to distinguish one tract from another. It could probably be applied to most city property. Perhaps only in very exceptional cases could it be said that it makes any difference to the public or to individuals whether a particular tract is in or out of a city, apart from the consideration that property so situated as to share in the benefits of city government ought also to share in its expenses. It cannot be conceived that the legislature intended by this act to exclude ⁴⁰ from the corporate limits of all the cities in the state all tracts of land of which it cannot be said that some public or private right other than those relating to taxation depends upon their retention. Under the provisions of the act the will that the corporate boundaries shall be changed proceeds not from the legislature or from the council, but from the signers of the petition, who are under no official responsibility, and of whom no other qualification is required than that they desire the change. These provisions are therefore void.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Smith, Cunningham, Greene, and Burch, JJ., concurring.

Johnston, C. J., dissenting.

The Legislature cannot Delegate to any person or body the power to determine what the law shall be, except when authorized by the constitution: *Anderson v. Manchester* etc. Assur. Co., 59 Minn. 182,

50 Am. St. Rep. 400; *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277. A provision in a statute, however, that it is not to take effect until a favorable vote by the people of a county is not an attempted delegation of legislative power: *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66; *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175.

SPANGLER v. ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY.

[68 Kan. 46, 74 Pac. 607.]

RAILWAY CORPORATIONS.—It is the Duty of Railway Corporations Carrying Passengers to provide for their safety and comfort and secure them against annoying and offensive conduct of other passengers, and, if necessary to that end, to exclude such other passengers from the train. (p. 393.)

RAILWAY CORPORATIONS—Duty to Protect Passengers from Exterior Assaults.—The duty of making passengers secure is not limited to conduct in the interior of the train, but applies as well to assaults coming from the outside of the car. If danger threatens from alongside the car, it should be averted precisely the same as if impending on any of its platforms or in any of its apartments. (p. 394.)

RAILWAYS—When Liable for Injuries to Passengers.—Where certain passengers on an excursion train became drunk and disorderly, and openly threatened in the presence and hearing of the conductor that when a designated place was reached where they were to leave the train, they would have revenge upon other passengers who had objected to their drunken, disorderly, and rowdy conduct, it became the duty of the company to take measures to prevent the threatened danger, and, failing to do so, it is answerable to an offending passenger injured thereby. (p. 395.)

John G. Parkinson and W. W. Redmond, for the plaintiff in error.

R. A. Brown, J. A. Broughton and W. S. Glass, for the defendant in error.

⁴⁷ BURCH, J. Among the many restless rushings to and fro of fretful man upon the earth was a Sunday excursion in July, 1901, from St. Joseph to Excelsior Springs, Missouri, and return, conducted by the St. Joseph and Grand Island Railway Company. The little town of Gower, located some fourteen miles from St. Joseph, contributed eight or ten young men to the ferment of the teeming train. The schedule gave the day to the excursionists at the Springs. On the return homeward in the evening it soon became distressingly apparent that the Gower boys had abused their holiday into a drunken spree.

Hilarity was presently succeeded by effrontery which readily descended to vulgarity, and tended constantly to reach the pitch of maudlin fuss and quarrel. They surged back and forth along the aisles of the cars with swagger and oath and a hubbub of babble, and a fanfaronade of clubs they had cut for canes, corrupting the air with the fumes of liquor and of cigarettes, hectoring men and insulting women, entirely beyond the endurance of the rasped nerves and galled sensibilities of the decent people on the train. Some of the passengers were intimidated and made afraid. Many protests and appeals were made to the trainmen, whose efforts to preserve order were quite feeble. Passengers, themselves, remonstrated with the young men, and one of them, after witnessing an indignity ⁴⁸ to a young woman, collared a rowdy and took him out of the car.

Because the St. Joseph passengers interfered with the prerogative of the Gower boys to be vulgar and vicious and vile, the latter became incensed, and turned their distempered thoughts to the subject of revenge. They cursed the St. Joseph people, and swore they would get even when they got off the train at Gower. Many persons in many parts of the train heard these threats and heard them repeated many times. They kept saying they would fix the St. Jo people when they got off at Gower—they would even up with the St. Jo people—they would have revenge on the St. Jo people when they got off the train. This threatening talk continued for a long time before the town of Gower was reached. The train officials frequently passed by while it was going on. One man who went through the train with the conductor heard it, and many men and women heard it in the presence of the conductor.

Upon its arrival at Gower the train had stopped but a moment until these threats were being carried out. No sooner had the Gower party alighted than some of them assailed the persons who remained upon the train with a fusilade of cinders and gravel and dirt thrown through the open windows, and which, scattering, beat noisily against the outside of the cars. Men and women suffered alike, and one gentleman was struck on the side of the head with a rock. Other of the ruffians walked forward and back, ramming their rude canes into the car and punching the passengers. As he did so one of them ejaculated, "How do you like that?" While this was going on one of the two conductors in charge of the excursion assisted the passengers to alight and then walked to ⁴⁹ the forward end of the train, where the other conductor was found

reading orders to the engineer. As the train started both conductors stepped on the steps at the front end of the first passenger-car, where they remained until a switch had been passed and closed, and then they went inside the car. This constituted the sum total of their watchfulness over the human beings in their care.

As passengers on the train that night were Ada Spangler, a maiden of seventeen years, and her escort, Joseph Manon. Their homes were in St. Joseph. They occupied a seat together in the forward part of the second passenger-coach from the engine, and though certain ugly circumstances of the turmoil of that night had transpired near them, they had not become involved in it themselves. The air was pleasanter near the window, and she sat on that side of the seat. It was nearing 10 o'clock when they approached Gower, and she had been leaning her head upon an improvised pillow he had made for her, but had not been asleep. At Gower they were both sitting upright, and while the train was standing still heard the storm of cinders and gravel striking against the side of the car. During the confusion, one of the Gower boys came to their open window and thrust his club cane through it, striking her in the breast, and causing her to cry out "Oh!" Mr. Manon immediately closed the window, and just after the train had started a heavy iron burr from off a bolt, hurled by the hand of one who dropped his cane to do so, came crashing through the glass and struck her in the eye. She fell forward, and as he caught her, all limp and apparently unconscious, and endeavored to support her head with his arm, the fluid portions of her eye ran out upon his hand.

50 Upon the trial of an action for damages brought against the railroad company for this injury, a demurrer to the evidence from which the foregoing facts are gleaned was sustained, and Miss Spangler brings the case here for review.

The law of the case is clear enough.

"It is the duty of a railroad company carrying passengers to provide for their quiet and comfort, and secure them against the annoying and offensive conduct of other passengers; and where the conduct of a passenger is such as to render his presence dangerous to fellow-passengers, or such as will occasion them serious annoyance and discomfort, it is not only the right, but the duty, of a railroad company to exclude such passenger from its train": *Atchison etc. R. R. Co. v. Weber*, 33 Kan. 543, 25 Am. Rep. 543, 6 Pac. 877.

This duty to make passengers secure is not limited to conduct exhibited in the interior of the train, but applies to assaults coming from the outside of the car as well. If the danger threatens from alongside the car, it should be averted precisely the same as if impending on any of its platforms or in any of its apartments. It would be a lame rule, indeed, which required nothing more than that a vicious person should be put off the train, and then left raging up and down its length, firing missiles through its windows. The Gower boys could have been separated from the orderly and sober part of the passengers while on the train, and when discharged from the car could have been sent away from it, and kept away from it until it was safe to proceed. For this purpose the conductor had the right, if necessary, to call upon all the trainmen and such passengers as were willing to assist. While not an insurer of the safety of its passengers ⁵¹ the railroad company was bound to exercise the strictest diligence in protecting them.

"If the conductor did not do all he could to stop the fighting, there was negligence. Whilst a conductor is not provided with a force sufficient to resist such a raid as was made upon the train in this instance, he has, nevertheless, large powers at his disposal, and, if properly used, they are generally sufficient to preserve order within the cars, and to expel disturbers of the peace. His official character and position are a power. Then he may stop the train and call to his assistance the engineer, the fireman, all the brakemen, and such passengers as are willing to lend a helping hand, and it must be a very formidable mob indeed, more formidable than we have reason to believe had intruded into these cars, that can resist such a force. Until at least he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion and busy himself with collecting fares in forward cars, whilst a general fight was raging in the rearmost car, where the lady passengers had been placed, was to fall far short of his duty": *Pittsburg etc. Ry. Co. v. Hinds*, 53 Pa. St. 512, 517, 91 Am. Dec. 224.

These rules, however, are subject to the qualification that the carrier shall know of the threatened injury, or shall have opportunity to know of it, or reasonably might have anticipated, under all the circumstances, that it would happen: 5 Am. & Eng. Ency. of Law, 2d ed., 553; *Flint v. Norwick etc. Trans. Co.*, 34 Conn. 554, Fed. Cas. No. 4873.

In Fetter on Carriers of Passengers, volume 1, section 96, the point is summed up in the following manner: "Carriers of

passengers are not insurers of the entire immunity of their passengers from the misconduct of fellow-passengers or of strangers, any more ⁵² than they are insurers of the absolute safety of passengers in other respects. Nor can the carrier be held liable for such misconduct on the principle of respondeat superior, as in the case of the misconduct of his servants. But although the doctrine is of comparatively recent growth, it is now firmly established that a carrier of passengers must exercise the same high degree of care to protect them from the wrongful acts of their fellow-passengers, or of strangers, that is required for the prevention of casualties in the management and operation of its trains, namely, the utmost care, vigilance and precaution, consistent with the mode of conveyance and with its practical operation. While not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is the carrier's duty to provide help sufficient to protect the passenger against assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties; and, having furnished such force, the carrier is chargeable with their neglect in failing to protect a passenger from assaults by strangers. This strict rule of duty must, however, be applied in view of the relation which the carrier sustains to all the passengers, and the circumstances of each particular case calling for its exercise. Knowledge of the existence of the danger, or of facts and circumstances from which the danger may be reasonably anticipated, is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it."

Such being the law applicable to the facts, the question remains whether or not the facts disclosed were sufficient to entitle the plaintiff to the verdict of a jury upon them. A critical analysis of the testimony is not necessary. From the evidence relating to the character, condition and conduct of the young men, it is reasonable to conclude that some depredation was to be committed upon the St. Joseph passengers at Gower. ⁵³ It is fairly inferable that the conductor knew, or should have known, of this danger, and hence that he should have exercised the highest vigilance and diligence to subvert it; that he failed to employ to that end any of the means at his command, and that the plaintiff's injury was the result of his negligence.

Therefore, the judgment of the district court is reversed, with the direction that a new trial be granted.

All the justices concurring.

It is the Duty of a Carrier to protect its passengers from injury, violence, insult, and ill-treatment at the hands of strangers, fellow-passengers, and employes; and for a failure to perform this duty it is answerable: Citizens' St. Ry. Co. v. Clark, 33 Ind. App. 190, ante, p. 249; Brunswick etc. R. R. Co. v. Ponder, 117 Ga. 63, 97 Am. St. Rep. 152; Houston etc. R. R. Co. v. Phillio, 96 Tex. 18, 97 Am. St. Rep. 868; Birmingham Ry. etc. Co. v. Baird, 130 Ala. 334, 89 Am. St. Rep. 43; United Ry. etc. Co. v. Deane, 93 Md. 619, 86 Am. St. Rep. 453; Spade v. Lynn etc. R. R. Co., 172 Mass. 488, 78 Am. St. Rep. 296; monographic notes to Rommel v. Schambacher, 6 Am. St. Rep. 734-737; Richmond etc. R. R. Co. v. Jefferson, 32 Am. St. Rep. 90-101; Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 89; Fewings v. Mendenhall, 97 Am. St. Rep. 526-532.

STOUFFER v. HARLAN.

[68 Kan. 135, 74 Pac. 610.]

JUDICIAL SALES.—The Omission of the Seal from an Order of Sale renders it and all proceedings thereunder void, and the purchaser acquires no title. (p. 397.)

A MORTGAGEE in Possession is one who has possession of the mortgaged premises under such circumstances as to make the satisfaction of the lien a prerequisite to his being dispossessed. (pp. 397, 398.)

MORTGAGEE in Possession, Lawful Entry of, What is.—The expression that the entry of the mortgagee must be lawful does not mean that it must have been effected under a formal right capable of enforcement by legal proceedings, but that it must not be through any unlawful or wrongful act upon which the mortgagee would be estopped to found a right. (p. 403.)

MORTGAGEE in Possession, Purchaser Under Void Foreclosure Sale, When Becomes.—If a sale under an order issued on a judgment foreclosing a mortgage is made to the mortgagee and is void because the seal was omitted from such order, but the purchaser takes possession pursuant to the sale, he becomes a mortgagee in possession who cannot be displaced without payment of the mortgaged debt. (p. 404.)

J. G. Hutchison, for the plaintiffs in error.

Charles B. Graves, for the defendants in error.

136 MASON, J. Prior to 1889, C. C. Stouffer was the owner of a tract of land in Lyon county, subject to a mortgage to the Emporia Investment Company. It was arranged that a new mortgage maturing January 1, 1894, should be given in satisfaction or extension of the old one. For some reason it was agreed that, instead of Stouffer's executing the new mortgage himself, the property should be conveyed to one F. R. Mason, who should make the mortgage and then reconvey to

Stouffer. This plan was carried out, although the formal conveyance was not made until some time later. Stevenson's part in the transaction is of no moment, as he was merely acting for Stouffer. In April, 1889, this mortgage was brought by, and assigned to, Phineas Prouty. In 1891 Prouty died, and executors were appointed and qualified. In October, 1894, suit to foreclose the mortgage was brought by the Emporia Investment Company in the name of the executors, service being made upon Stouffer, a nonresident, by publication. The executors afterward ratified and adopted the act of the investment company in bringing the suit. A judgment of foreclosure was rendered and an order of sale was issued, from which the seal of the court was omitted. Under color of this process the property was sold by the sheriff and bid in by Richard D. Harlan, one of the plaintiffs. In October, 1895, at the request of the executors, a sheriff's deed was made to James S. Harlan, who held it for the estate, acting for and under the direction of the executors.

W. L. Loomis, as the tenant of Stouffer, occupied the property in 1895 and until about March 1, 1896, when Edwin Hawkins, to whom Harlan proposed to ¹²⁷ lease it for the ensuing season, at Harlan's suggestion requested him to vacate as soon as his time as tenant expired, which he understood to be on March 1st. Loomis did vacate the property accordingly prior to March 1st, and after that date Hawkins entered upon it as the tenant of the executors, who thereby acquired its quiet, peaceable and exclusive possession and control. Stouffer had no knowledge of the foreclosure proceedings until the summer of 1896. In September, 1898, he began an action against Harlan and the executors for the recovery of the possession of the property and was defeated. He brings this proceeding to reverse the judgment.

The omission of the seal rendered the order of sale and all proceedings under it null and void: *Gordon v. Bodwell*, 59 Kan. 51, 68 Am. St. Rep. 341, 51 Pac. 906. Irrespective, therefore, of any question growing out of its being made to an apparent stranger to the proceedings upon which it was based, the sheriff's deed passed no title. The trial court held that the circumstances stated made the defendants "mortgagees in possession," and precluded the plaintiff from recovering the property without paying the mortgage debt. The question here presented is whether this ruling was correct.

The expression "mortgagee in possession" has been adopted by the courts and law-writers as a convenient phrase to descr

the condition of a mortgagee who is in possession of mortgaged premises under such circumstances as to make the satisfaction of his lien a prerequisite to his being dispossessed, even in jurisdictions where the mortgage itself can confer no possessory right either before or after default; but the authorities are in some confusion as to what these circumstances are. It has been said that the possession ¹³⁸ must be "lawfully" acquired (*Gillett v. Eaton*, 6 Wis. 30; *Tallman v. Ely*, 6 Wis. 244); that it is sufficient that it is acquired "peaceably" (*Hennessy v. Farrell*, 20 Wis. 46; *Brinkman v. Jones*, 44 Wis. 498); or "without force" (*Pell v. Ulmar*, 18 N. Y. 139, 142); that it must be taken under the mortgage and because of it (*Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765); that it need not have been given under the mortgage, or with a view thereto (*Madison Ave. Bapt. Church v. Oliver St. Bapt. Church*, 73 N. Y. 82); that it must be by consent of the mortgagor, express or implied (*Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765); that it is not sufficient if obtained by an arrangement with the tenant of the mortgagor after his lease had expired (*Russell v. Ely*, 2 Black (U. S.) 575, 17 L. ed. 258).

Many cases are reported in which possession was obtained under color of irregular or void foreclosure proceedings. In some of these, such as *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896, and *Cross v. Knox*, 32 Kan. 725, 5 Pac. 32, the possession was held sufficient upon the ground that it was taken with the express or implied consent or acquiescence of the mortgagor, or that the mortgagor had waived the right to object. But in others the fact that the mortgagee took possession in reliance upon foreclosure proceedings which he in good faith believed to be valid is made a distinct ground for according him the rights of a "mortgagee in possession," apart from any question of the consent or acquiescence of the mortgagor.

In *Van Duyne v. Thayre*, 14 Wend. 233, 235, it was said: "If the mortgagee after forfeiture entered into possession, either by the consent of the mortgagor or by means of legal proceedings, he may defend himself there, at least till his debt is paid." However, ¹³⁹ as possession in that case was not taken in virtue of any proceedings in court, it would seem that the words "or by means of legal proceedings" are obiter, or else "legal" is used merely in the sense of "lawful."

In *Cooke v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709, 23 Pac. 945, 7 L. R. A. 273, the second paragraph of the syllab-

bus, which was quoted with approval in *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, reads as follows: "If, for any cause in the foreclosure suit, the proceeding is ineffectual to foreclose the mortgage, and the mortgagee purchases at a sale under such void proceedings, and enters into the possession under such sale, his relation to the mortgaged premises is that of a mortgagee in possession."

This accurately indicates the scope of the opinion, but the argument in support of the conclusion is based almost entirely upon the authority of various New York cases in which the language used is broader than the facts under consideration required.

In *Bryan v. Brasius*, 3 Ariz. 433, 438, 31 Pac. 519, in a case where possession was taken under invalid foreclosure proceedings, without fraud, there being however no suggestion of consent of the mortgagor, it was said: "But the facts in the case disclose an indebtedness of two thousand five hundred dollars to Kales from T. J. Bryan, and a mortgage to secure the same on the property in dispute, a proceeding in court, in good faith and without fraud on the part of Kales or anyone, to foreclose the mortgage (the proceeding thought to be valid and regular on its face), a sale under the decree of the court, and possession taken in pursuance thereof, and taxes paid and valuable and lasting improvements made by the purchaser and his grantees. The plaintiff brings suit by action of ejectment. He does not pay or offer to pay the mortgage debt. In this territory the action of ejectment is based upon the ¹⁴⁰ right of possession. I think, on the very best of authority and the highest equity, the defendant must be held to be the mortgagee in possession, and subrogated to the rights of Kales under his mortgage, and entitled to remain in possession till the requirements of equity are fully met."

This case was taken to the United States supreme court, where it was affirmed (*Bryan v. Brasius*, 162 U. S. 415, 16 Sup. Ct. Rep. 803, 40 L. ed. 1022, following *Bryan v. Kales*, 162 U. S. 411, 16 Sup. Ct. Rep. 802, 40 L. ed. 1020), but upon the authority of cases arising in jurisdictions where the mortgagee, after condition broken, has the legal estate in the mortgaged property, without any discussion as to whether the rule should be the same where the mortgage merely gives a lien.

In *Romig v. Gillett*, 187 U. S. 111, 23 Sup. Ct. Rep. 40, 47 L. ed. 97, it was said: "A mortgagee who enters into possession not forcibly but peacefully and under the authority of a for

closure proceeding, cannot be dispossessed by the mortgagor, or one claiming under him, so long as the mortgage remains unpaid."

But this was stated not as a determination then reached by the court upon consideration of the matter before it, but as the effect of the opinion in *Bryan v. Brasius*, 162 U. S. 415, 16 Sup. Ct. Rep. 803, 40 L. ed. 1022, and cases there cited.

In *Barson v. Mulligan*, 66 App. Div. 486, 489, 491, 73 N. Y. Supp. 262, it was said: "The only question, therefore, that can arise as to the right of a mortgagee in possession to hold the premises until the mortgage debt is paid, depends upon the method by which he obtained possession, and it is claimed that that possession must be with the assent of the mortgagor, but I can find no authority limiting the right of a mortgagee to hold property, of which he is in lawful possession, to a case where such ¹⁴¹ possession was with the consent of the mortgagor.

. . . . What is essential to entitle a mortgagee to hold possession of the premises until his mortgage debt is paid is that his possession should have been lawfully acquired. If, under a deed which purports to convey title, a mortgagee enters into possession, although that deed is void, he is entitled to maintain possession until his mortgage debt is paid. This follows from the decisions in the cases in which a mortgagee has entered under a deed in a foreclosure proceeding, either statutory or by action of foreclosure." But it is at least doubtful whether this language was warranted by the authorities to which it referred.

In *Backus v. Burke*, 63 Minn. 272, 277, 65 N. W. 459, the court gave full consideration to the very question under discussion and reached a conclusion indicated by the following extracts from the opinion:

"We are of the opinion that when there is a default in the mortgage, and the mortgagee in apparent good faith makes a void foreclosure, and, after the end of the year to redeem, the purchaser at the foreclosure sale takes possession under color of the foreclosure proceedings, he should be treated as a mortgagee in possession, whether he takes possession with or without the consent, either express or implied, of the mortgagor. It is true that, unlike a mortgage at common law, a mortgage under our statute gives the mortgagee neither the title nor right of possession. But the courts were long ago compelled to recognize marked difference between the character of our statutory mortgage after default but before foreclosure, and the character the same mortgage after an abortive foreclosure and the

year to redeem has expired. . . . Every mortgagor understands, when he executes a mortgage, that if he defaults in the conditions to be by him performed an attempt will be made to foreclose the mortgage. If he makes no effort to take advantage of the irregularities in an abortive foreclosure until after the year to redeem has expired, ¹⁴² and the purchaser at the foreclosure sale has in good faith taken possession, what court will then oust such purchaser without payment of the mortgage indebtedness, even though there was no express consent of the mortgagor to such possession, and the circumstances raise no presumption of an implied consent? . . . Surely, the mortgagor cannot, in such a case, obtain possession except through an action to redeem, whether the purchaser has been in possession one day or nine years. But if the purchaser has been in possession only one day, it cannot be held that so short a period of possession is of itself sufficient evidence of the consent of the mortgagor to that possession. Then it cannot be held that the purchaser's right to continue in such possession, taken peaceably and in good faith, after the year has expired, is based on the mortgagor's consent, express or implied, but, on the contrary, it is based on that rule of law which denies to the mortgagor in such a case any remedy but one in equity, which will compel him to do equity."

This we regard as the most full and satisfactory discussion of the question upon its merits to be found in any adjudicated case.

On the other hand, in *Howell v. Leavitt*, 95 N. Y. 617, the owners of the mortgaged property were permitted to maintain ejectment against a mortgagee who had acquired possession by a writ of assistance under a void judgment. The land was owned by minors and occupied by their tenant, who was dispossessed under the writ without their knowledge. The decision was based upon the ground that such possession was obtained by force and was unlawful. In *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387, 77 N. W. 942, and in *McClory v. Ricks*, 11 N. Dak. 38, 88 N. W. 1042, it was held that ejectment may be maintained against a mortgagee who is in possession under a void or irregular foreclosure, but the argument ¹⁴³ presented in support of these decisions and of others which they follow was largely directed against the right of the mortgagee who is out of possession to bring action to be let into possession, the courts refusing to recognize any distinction between the right to demand possession and the right to hold i

when it is once obtained. The same conclusion was announced in *Lewis v. Hamilton*, 26 Colo. 263, 58 Pac. 196, but without extended discussion and upon the authority of a Michigan case.

To determine the true extent of the doctrine under consideration, in the face of these conflicting decisions, it is well to consider its origin and reason. In an article entitled "How mortgagee as such can get possession," published in the *Albany Law Journal* (vol. 26, p. 526, and vol. 27, p. 6), an ingenious review of the New York cases was presented in support of the contention that the right of the mortgagee to retain possession is founded upon contract, and therefore exists only when the mortgagor agrees that the mortgagee may take possession of the mortgaged property for his better security. This view would practically do away with the doctrine altogether, since it is not necessary to invoke any peculiar rule of equity to provide for the enforcement of such an agreement. In *Howell v. Leavitt*, 95 N. Y. 617, it was suggested, that the old rule existing when a mortgage actually passed the title to the property kept its hold upon the later opinions when the reason which led to it was gone. Mr. Pomeroy, in his work on Equity Jurisprudence, adopts this view of the origin of the doctrine, but adds:

"The courts, while retaining the doctrine as settled, have guarded against any inference from it that the mortgagee has acquired a legal estate by his possession; his right to retain possession does not depend ¹⁴⁴ upon an estate held by him; his possession is protected by his lien. It is certainly more simple and just that the mortgagee should be left in possession and the mortgagor forced to redeem, than that the mortgagor should be permitted to recover the possession by an action at law, and be immediately liable to the consequences of a foreclosure suit in equity brought by the mortgagee": 3 Pomeroy's Equity Jurisprudence, sec. 1189.

And in *Gillett v. Eaton*, 6 Wis. 30, 40, it was said: "If the defendant is turned out of possession because he is in as a mere mortgagee, he will be put to the trouble and expense of foreclosing his mortgage, and perhaps put to the necessity of taking legal steps to regain possession. It is not the policy of the law to encourage such litigation. And substantial justice will be better subserved by permitting the mortgagee to retain the possession which he has lawfully acquired, until the mortgagor, or one claiming under him, shall institute proceedings for the purpose of redemption."

And in *Tallman v. Ely*, 6 Wis. 244, 256, the court said: "It would be unwise and inequitable to permit the grantee of the mortgagor to obtain the possession as against the mortgagee or his assigns while the mortgage debt remained unpaid. Under the circumstances, if the grantee desired to obtain possession of the premises, he could file his bill to redeem, and the court could properly aid him in obtaining possession after the encumbrance was discharged. In this way equity could be fully done between all parties. Again, if the court should put the mortgagor or his grantee in possession of the premises without requiring him first to pay off the mortgage, it might be called upon at the next moment in a proceeding to foreclose and sell the mortgaged premises to turn him out and reinstate the mortgagee or his assignee. But all this unnecessary expense and fruitless litigation can be avoided, and the rights and interests of the parties most completely ¹⁴⁵ subserved and protected by adhering strictly to the doctrine, that if the mortgagee or his assigns, after forfeiture, obtains possession lawfully, the mortgagor, or those claiming under him, should not recover the possession without paying the money secured by the mortgage."

Substantially the same reasoning has been employed in other cases, as shown by several of the quotations already made. Whatever may be the source of the rule historically we think it is justified upon equitable principles by the considerations just stated, and that it should be followed because of that fact and be administered with reference to it; that it should be acted upon when the circumstances are such that these reasons are applicable, and only then. It is obvious that such reasons apply to all cases in which the mortgagee has actual possession of the mortgaged property, except where he has acquired it under such circumstances that it would be inequitable to permit him to assert a right under it. The expression frequently used, that the entry must be lawful, we interpret to mean not that it must have been effected under a formal right capable of enforcement by legal proceedings, but that it must not be through any unlawful or wrongful act, upon which the mortgagee would be estopped to found a right. The importance given to the matter of the consent or acquiescence of the mortgagor we conceive to be derived not from the idea of its establishing a contract (since, as already suggested, if a contract for possession exists there is no occasion to invoke the rule) but⁺ from the fact that it frees the mortgagee from any suspicion of having obtained possession by fraud or force.

We conclude that the true rule is that when the mortgagee is in possession of the mortgaged premises ¹⁴⁶ after condition broken he may not be dispossessed without a payment of the mortgage debt, unless his possession was acquired under such circumstances that he ought not in equity to be permitted to retain it. This conclusion may not go far toward the practical solution of questions involving the application of the doctrine, but it is sufficient for the purposes of the present case, since it is clear that one who assumes possession of the mortgaged property under color of foreclosure proceedings believed by him to be valid, however defective they may be in fact, cannot be thought to have thereby estopped himself to assert the right otherwise given him to retain possession until his debt is paid. There is nothing in the facts of this case to impeach the good faith of defendants in error or to charge them with the use of force or fraud in gaining possession, and they are within the protection of the rule as stated.

Two minor questions are also presented. The plaintiff below, in his reply, pleaded that the mortgage debt had been paid. He offered no proof under this allegation until the cause had been submitted to the court and the decision announced. Then he asked leave to introduce evidence in support of it, but the request was denied. It is not necessary to decide whether the evidence would have been admissible if presented earlier in the proceedings, because, even if so, it cannot be said that it was an abuse of discretion for the court to reject it at the time it was offered. It is now urged that there was a presumption that the debt was paid, arising from the fact that the judgment had become dormant. The judgment was not dormant on any theory when this action was begun, or when the pleadings were settled, so the principle invoked has no application. If the judgment is in fact dormant ¹⁴⁷ now the situation furnishes a good illustration of a class of cases, readily to be imagined, in which the doctrine just discussed serves to prevent gross injustice.

The plaintiff, upon other considerations, did recover a part of the real property sued for, upon which defendants held a tax deed, the recovery being subject to the adjustment of the taxes and rents and profits. The trial court divided the costs, permitting the plaintiff to recover the same proportion of the whole costs that the tract recovered bore to the whole land sued for, ⁱⁿventh. This apportionment we think erroneous. ^{to} divide the costs; not, however, because the

plaintiff recovered only a part of the property claimed, since ordinarily this would entitle him to all his costs (*Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14), but because the recovery was conditioned on the settlement of the lien for taxes. In such cases an even division of the costs has been ordered: *Longworth v. Johnnon*, 66 Kan. 193, 71 Pac. 259. It does not follow that a trial court under similar circumstances may never adopt any other basis of division than the arbitrary one of equality. But as the division in this case was made upon a theory which is held to be erroneous, it is ordered that the costs be divided equally between plaintiff and defendants. Otherwise the judgment is affirmed.

The costs in this court are divided equally.

All the justices concurring.

A Mortgagee who purchases and enters into possession under a void foreclosure, the mortgagor acquiescing therein, is a "mortgagee in possession": *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308. That the possession of a mortgagee is presumed to be rightful, see *Hooper v. Young*, 140 Cal. 274, 98 Am. St. Rep. 56.

The Omission of the Seal of the court from the order of a sale as affecting the validity and effect of the sale is considered in *Hager v. Astorg*, 145 Cal. 548, ante, p. 68, and cases cited in the cross-reference note thereto.

BIRKET v. ELWARD.

[68 Kan. 295, 74 Pac. 1100.]

NEGOTIABLE INSTRUMENTS—*Bona Fide Holder—Pre-existing Debt.*—One who acquires a negotiable instrument as security for pre-existing indebtedness is a holder for value and in due course of business. (p. 411.)

Carr W. Taylor and J. U. Brown, for the plaintiff in error.

George A. Vandever and F. L. Martin, for the defendants in error.

²⁹⁵ **MASON**, J. John H. Elward and William A. R. Elward, on September 25, 1894, executed to George T. Gilliam a negotiable note due in five years, and William A. R. Elward executed as security for the note a mortgage on real estate in Reno county. On June 24, 1901, John Charles Birket sued the Elwards on the note and mortgage, claiming to have acquired

them by indorsement and under such circumstances as to make him an innocent purchaser. The defendants answered with a general denial which put in issue the question whether plaintiff was a bona fide holder, and an allegation that the note had been fully paid to Gilliam by the makers without knowledge or notice of any transfer to plaintiff. A reply was filed consisting of a general denial.

Upon the trial plaintiff testified that he acquired the note April 28, 1896, as collateral security for a loan of two thousand dollars made to Gilliam at that time. The evidence of defendants showed that on May 25, 1896, the Elwards executed a new note and mortgage to Gilliam in consideration of the satisfaction of the old debt and an additional loan of five hundred dollars; that the old papers were surrendered to John H. Elward, who placed them in a box, which he left in the custody of Gilliam; that on June 25, 1896, a release of the first mortgage, executed and acknowledged by Gilliam, was filed for record with the register of deeds. The amount due plaintiff from Gilliam was shown to be eight hundred and fourteen dollars. The court instructed the jury that the only question for their determination was the date at which plaintiff acquired the note; that if he acquired it before June ^{29th} 25, 1896 (the date of the record of the satisfaction of the mortgage), he should recover; that otherwise the verdict should be for defendants. The jury found specially that plaintiff acquired the note after that date, and judgment followed for the defendants, which plaintiff now seeks to reverse.

The theory upon which the trial court held the date of the recording of the mortgage release to be important is not discussed in the briefs, and is not material, since the instruction and judgment are now defended on the ground that if plaintiff took the note as collateral security for Gilliam's debt at any time after such debt was created (namely, April 28, 1896), he took it subject to any defense that could be made against the original payee. It is obvious that plaintiff could only recover on the theory that he was an innocent purchaser, and the sole question here involved, therefore, is whether one who takes commercial paper as collateral security for an existing debt, without an agreement for an extension of time or other new condition, is ever entitled to protection as a bona fide holder. The judgment must be reversed; otherwise it must be affirmed.

The rule in the federal courts as well as in those of England and Canada is that the holder of a negotiable note taken as collateral security for a pre-existing debt is a holder for value in due course of business, and as such is protected against all latent equities of third parties. The state courts that have passed upon the question are in irreconcilable conflict. The cases are collected in volume 4 of the American and English Encyclopedia of Law, second edition, pages 290 to 293, and in volume 7 of the Cyclopedia of Law and Procedure, pages 932 to 935. The lists there given indicate with substantial, but not absolute, correctness ²⁹⁸ the line of cleavage. It is to be noted that in each of them Kansas is wrongly placed among the states that are committed to the rule stated, upon the strength, respectively of the cases of *National Bank v. Dakin*, 54 Kan. 656, 45 Am. St. Rep. 299, 39 Pac. 180, and *Best v. Crall*, 23 Kan. 482, 33 Am. Rep. 185. While these cases have a tendency in that direction they do not go the full length indicated. In *National Bank v. Dakin* the note involved was transferred as collateral security for a debt created at the time of, and in reliance upon, such transfer, which was therefore supported by a new consideration sufficient upon any theory of the law. In the opinion a number of cases are cited as supporting the proposition that even a pre-existing debt would afford a sufficient consideration for the purpose, and among them was included *Best v. Crall*, 23 Kan. 482, 33 Am. Rep. 185. In that case the collateral note was in fact transferred as security for a debt that already existed, but this was done pursuant to a promise made when such original debt was created, so that the effect was the same as though the transfer had actually been made at that time.

A careful examination of the cases cited in the lists referred to discloses that in the following states the rule of the federal courts has been adopted, although in California and Nevada the matter is affected by statutory provisions that the acceptance of the security forfeits a right to attach: California, Colorado, Connecticut, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Rhode Island, South Carolina, Texas, Vermont, and West Virginia. Nebraska also is now committed to this doctrine: *Lashmett v. Prall*, 2 Neb. (Unofficial) 284, 96 N. W. 152. Such citations further show that in the following states the rule has been denied: Alabama, ²⁹⁹ Arkansas, Iowa, Kentucky, Mair Michigan, Mississippi, Missouri, New Hampshire, New Yo

North Dakota, Ohio, Pennsylvania, Tennessee, Virginia and Wisconsin. North Carolina also should now be placed in this list, but there, as well as in Tennessee and in Virginia, the recent adoption by the legislature of a complete code relating to negotiable instruments is held to have changed the rule: *Brooks v. Sullivan*, 129 N. C. 190, 39 S. E. 822; *Bank of Charleston v. Johnston*, 105 Tenn. 521, 59 S. W. 131; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379. The same code was adopted in New York in 1897. Upon the strength of its provisions that "value is any consideration sufficient to support a simple contract," and that "an antecedent or pre-existing debt constitutes value," it was held in *Brewster v. Shrader*, 26 Misc. Rep. 480, 57 N. Y. Supp. 606, that the law in this respect, as formerly administered in that state, had been changed, and that now "an indorsee of a note taken as collateral to a pre-existing indebtedness is a holder for value, unaffected by equities between the original parties." But in *Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. Supp. 504, this was denied, and it was said that this part of the new statute is purely declaratory. We do not discover that the New York court of appeals has passed on the effect of this legislation on the matter under consideration.

What may fairly be called the minority doctrine originated in New York in *Bay v. Coddington*, 5 Johns, Ch. 54, 9 Am. Dec. 268, the opinion being written by Chancellor Kent. The leading case in this country on the majority side is *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865, the opinion being written by Justice Story. It was there declared that one who took negotiable paper in payment of, or as security for, a pre-existing debt, was a holder for value and in due course of business,³⁰⁰ and the argument was made in support of that express proposition. But the reference to paper taken as security was not required by the facts of the case, and Justice Catron dissented on this ground. In *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61, the same reasoning was adopted and applied in a case where the transfer was made merely to secure an antecedent debt. The note there involved had several indorsers and the obligation assumed by the last holder to give them notice of nonpayment was treated as a part of the consideration of the transfer, but the decision did not turn upon this treatment. And in *American File Co. v. Garrett*, 110 U. S. 288, 4 Sup. Ct. Rep. 90, 28 L. ed. 149, the principle was applied where there were no prior indorsers. In the opinion in *Railroad Co. v. National Bank*, it was noted (citing 3 Kent's Commentaries, p. 81, note

b) that Chancellor Kent, after the decision in *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865, indicated that he was inclined to concur in it as the plainer and better doctrine.

The cases of *Bay v. Coddington*, 5 Johns. Ch. 54, 9 Am. Dec. 368, and *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865, are cited in almost every opinion in which the merits of the question under consideration are discussed, and the state courts have ordinarily taken sides upon the matter as the arguments of the one decision or the other have appealed to them with the greater force. In the former case it was said: "It is the credit given to the paper, and the consideration bona fide paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it."

In the latter case it was said: "Receiving it [negotiable instrument] in payment of, or as security for a pre-existing debt, is ³⁰¹ according to the known usual course of trade and business. And why upon principle should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts": 16 Pet. 19, 10 L. ed. 865.

Among other arguments advanced in behalf of the majority view are these, that the question is really one of the law merchant—the custom of merchants, and that a "transfer by a debtor to his creditor of a negotiable instrument, to pay or only to secure a prior debt, makes the creditor a holder for value 'the custom': Bigelow on Bills and Notes and Checks, 2d e

247; that the creditor, in accepting a negotiable note, whether or not there are parties to be charged by notice, does undertake to exercise some degree of diligence (2 Randolph on Commercial Paper, 2d ed., sec. 804), thereby affording a new consideration; or at all events that he "is naturally lulled into security and inactivity by crediting the face of the note; and he should not be made to suffer by the maker for confidence ³⁰² which his own promise created": 1 Daniel on Negotiable Instruments, 5th ed., sec. 831a; that the true consideration for the transfer is the debt due from the indorser to the indorsee and the obligation to pay or secure said debt; that such transfer is a sufficient consideration, because "security for the payment of a debt actually owing is a good consideration, and sufficient to support a transfer of property": Railroad Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61. That the policy of the law is to facilitate the transfer of negotiable paper free of equities is illustrated by the fact that it is almost universally held that one who acquires it in payment of an antecedent debt is a bona fide holder (Draper v. Cowles, 27 Kan. 484; 4 Am. & Eng. Ency. of Law, 2d ed., 285); whereas the ordinary rule in reference to protection under recording acts is that one who accepts property in satisfaction of an existing debt is not an innocent purchaser: 23 Am. & Eng. Ency. of Law, 2d ed., 490; Dolan v. Van Demark, 35 Kan. 304, 10 Pac. 848; Henderson v. Gibbs, 39 Kan. 680, 18 Pac. 926. Even where the New York doctrine is accepted an exception is made against the plea of lack of consideration when made by an accommodation party to the paper transferred as security: Grocers' Bank v. Penfield, 69 N. Y. 502, 25 Am. Rep. 231; Maitland v. Citizens' Nat. Bank of Baltimore, 40 Md. 540, 17 Am. Rep. 620; Smith v. Wachob, 179 Pa. St. 260, 36 Atl. 221.

If the question were a new one, to be determined upon the consideration of equitable principles, there would be strong reasons for holding that he who takes a note merely as security for an existing debt acquires no greater right than his debtor had. The reasons given in Mann v. National Bank, 30 Kan. 412, 1 Pac. 579, for applying this rule to a bank that receives a note from a depositor and adds the amount to ³⁰³ his account, which is not overdrawn, would seem to apply to the case of one who receives the paper as collateral for an indebtedness already existing. He parts with nothing, and is in no worse position than he was before. It requires no variation of usual care to save him from loss. But, on the other hand, the

same arguments would reach the case of him who takes commercial paper in payment of an existing unsecured debt. He likewise is in no way placed in any worse situation than he was before, since while the original debt may be regarded as technically canceled, he at all events has his remedy upon the collateral against the person from whom he received it, whatever defense might be available to the maker. He still has a valid claim against his original debtor, and that is all he had in the first place: 1 Randolph on Commercial Paper, secs. 461-465. Yet, as has just been said, one acquiring commercial paper under such circumstances is held to be protected as an innocent purchaser.

But the question before us is peculiarly one in which great weight should be given to the authorities, and especially to the decision of the courts of the national government, which do not recognize any local law in such matters: *Oates v. National Bank*, 100 U. S. 239, 25 L. ed. 580. The question is one likely to arise frequently in transactions between inhabitants of different states. It is important that the law be uniform in the different jurisdictions. The recognition of this consideration prompted the effort at codification of the law of negotiable instruments which resulted, as already noted, in a reversal of policy in North Carolina, Tennessee, and Virginia, and perhaps in New York. Of this effort it is said, in a book review in 38 *American Law Review*, pages 150, 151:

"In December, 1895, a draft of an act was prepared ³⁰⁴ by Mr. John J. Crawford, of the bar of New York city, and was reported to the meeting of the New York board of commissioners for promoting uniformity of legislation, which sat at Saratoga in 1896. Then, after consultation with the state board, with the committee of the American Bar Association on commercial law, and after consideration by that association, it was revised and finally adopted. . . . It has been adopted by the legislatures of twenty-two states of the Union, if we include the District of Columbia, the legislature of which is the Congress of the United States."

We prefer to hold in accordance with the weight of authority that an indorsee of negotiable paper taken as security for a pre-existing debt is a holder for value and in due course of business, and therefore, in the absence of any circumstances charging him with notice, is protected against a claim of payment made to the original payee.

It is to be noted that the petition in this case alleges that the note in question was indorsed by Gilliam to plaintiff. This statement was not denied under oath and was therefore not put in issue. The record shows that the note with all indorsements was offered in evidence as a part of plaintiff's deposition, but the purported copy does not show any indorsement. In the state of the pleadings this is not material, but of course, if the note was not actually indorsed by Gilliam, plaintiff was not in fact a bona fide holder.

The judgment is reversed and the cause remanded for a new trial.

All the justices concurring.

One Taking Negotiable Paper in payment of a pre-existing debt is a bona fide holder: Mack v. Prang, 104 Wis. 1, 76 Am. St. Rep. 848; Poston Steel etc. Co. v. Stener, 183 Mass. 140, 97 Am. St. Rep. 426; Evans v. Speer Hardware Co., 65 Ark. 919, 67 Am. St. Rep. 919; Herman v. Gunter, 83 Tex. 66, 29 Am. St. Rep. 632. And one taking negotiable paper as security for a pre-existing debt is generally regarded as a bona fide holder: Prim v. Hanmel, 134 Ala. 652, 92 Am. St. Rep. 52; Louisville Bank. Co. v. Howard, 123 Ala. 380, 82 Am. St. Rep. 126; Russ Lumber etc. Co. v. Muscupiabe Land etc. Co., 120 Cal. 521, 65 Am. St. Rep. 186; Rosemond v. Graham, 54 Minn. 323, 40 Am. St. Rep. 336; Crump v. Berdan, 97 Mich. 293, 37 Am. St. Rep. 845; Koehler v. Dodge, 31 Neb. 328, 28 Am. St. Rep. 518. There are cases, however, which seem to stand for a contrary doctrine: See First Nat. Bank v. Strauss, 66 Miss. 479, 14 Am. St. Rep. 579; Smith v. Bibber, 82 Me. 34, 17 Am. St. Rep. 464; Vaun v. Marbury, 100 Ala. 438, 46 Am. St. Rep. 70; Loewen v. Forsee, 137 Mo. 29, 59 Am. St. Rep. 489; Yellowstone Nat. Bank v. Gagnon, 19 Mont. 402, 61 Am. St. Rep. 520.

MEAD v. PHOENIX INSURANCE COMPANY.

[68 Kan. 432, 75 Pac. 475.]

INSURANCE—Stipulation as to Time to Commence Actions—Application of to Minors.—A stipulation in a policy of insurance limiting the time within which suit may be brought thereon is good even as against minor beneficiaries. (p. 414.)

Carroll, Monahan & Warren, for the plaintiff in error.

McAnany & Alden, for the defendant in error.

* SMITH, J. In March, 1894, Kenneth Mead was a twelve years of age and the owner of two lots on which stood a frame dwelling. The building was destroyed by

fire on May 11, 1894, while insured for six hundred dollars in the Phoenix Insurance Company. Soon after the loss the mother of the insured settled with the company for four hundred and seventy-five dollars through her attorney, C. C. Dail.

On May 26, 1902, after Kenneth Mead became of age, he brought this action against the insurance company to recover the amount of the policy, with interest. The petition sets out the fact of the fire, notice of the loss to the company, and the date and number of the policy, and avers that plaintiff on his part had performed all of its conditions. The petition, to which a copy of the policy was attached as an exhibit, contained an allegation as follows:

"The plaintiff further says that shortly thereafter, to wit, August 2, 1894, through and by a conspiracy between defendant and another person, one C. C. Dail, the said policy No. 4930 was surreptitiously obtained from this plaintiff, then still a minor, and for a small consideration from defendant to said Dail, delivered unlawfully and wrongfully to defendant and by it canceled; so that, if the copy of said policy which is hereto attached, marked 'Exhibit A,' and made part hereof, is not an exact copy, the failure thereof is attributable to the cancellation of the same by defendant. Plaintiff further says that at said time, nor until the year 1896, he did not have any guardian to represent his interests in that or any other respects, and that only on or about the fifteenth day of May, 1902, did he, when he became of full age, acquire the right to do so himself; and if any default has accrued in the premises against him he pleads his minority against the same."

424 The answer of the defendant below contained three defenses: 1. A general denial; 2. Breach of covenant to give immediate notice of loss and make proof within sixty days; 3. A failure to bring an action on the policy within twelve months after the fire. To these defenses plaintiff below replied that after the fire he had done all things required of him by the conditions of the policy, and that "through and by a conspiracy between said defendant and one C. C. Dail, for a small sum as in payment of said loss so covered by said policy, said defendant unlawfully and wrongfully obtained said policy from the said C. C. Dail and converted said policy to its own use and canceled the same, whereby it waived all the conditions of said policy required to be complied with by said plaintiff, if they had not been complied with by him, which plaintiff asserts had been done." A trial was had to the court without a jury, result^d in a judgment for the defendant below.

The policy contained this condition: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire."

It is clear that the action was based on the policy of insurance. The allegation in the petition respecting a conspiracy between the company and Dail was made to excuse plaintiff in his failure to set up a true copy of the policy. The action was not founded on the conspiracy; it did not sound in tort. In the plaintiff's reply he alleged that the conditions precedent to a recovery by him had been waived by the insurance company in wrongfully obtaining the policy from Dail, thus confessing that he was bound by all ⁴³⁵ the provisions in the insurance contract except the conditions pleaded in the answer.

The action of plaintiff below was barred by the limitation of time fixed in the policy for the commencement of an action, which was twelve months from the time of loss. When the policy was issued and the loss occurred, the agreement limiting the time within which an action to recover on the insurance contract might be commenced was not illegal: *McElroy v. Continental Ins. Co.*, 48 Kan. 200, 29 Pac. 478. By chapter 91 of the Laws of 1897, such contracts are no longer permitted: Gen. Stats. 1901, sec. 4446, subd. 7. The contract limitation in the policy controlled the general statute of limitations and was good even against minor beneficiaries: *Suggs v. Travelers' Ins. Co.*, 71 Tex. 579, 9 S. W. 676, 1 L. R. A. 847; *O'Laughlin v. Union Cent. Life Ins. Co.*, 3 McCrary (C. C.), 534, 11 Fed. 280. See, also, *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, 19 L. ed. 257.

In *McElroy v. Continental Ins. Co.*, 48 Kan. 200, 29 Pac. 478, the dismissal of an action brought within the time required by the policy was held not to extend the time to begin another within a year, under section 4451 of the General Statutes of 1901.

The judgment of the court below will be affirmed.

All the justices concurring.

The Parties to a Contract of Insurance may, it seems, limit the time within which an action thereon may be brought: *McFarland v. Railway etc. Assn.*, 5 Wyo. 126, 63 Am. St. Rep. 29. As to whether a to sue within the time prescribed will be excused by an error or by ignorance of the limitation, see *Paul v. Fidelity etc. ass.* 413, post, p. 594.

KIMMEL v. BEAN.

[68 Kan. 598, 75 Pac. 1118.]

BANKS, Charging with Notice of the Relations of a Depositor to Another.—The fact that a bank knows that a person depositing a check is engaged in the commission business and sometimes overdraws his account does not charge it with notice that a check deposited by him is for property sold for one of his customers who is entitled to the proceeds thereof. (p. 416.)

BANKING—Agreement to Apply Deposit on Overdraft, When Implied.—Where a depositor carries an account with a bank as part of his usual business, continually drawing checks and making deposits, sometimes having a balance to his credit and sometimes being overdrawn, his mere act of making a deposit is equivalent to an agreement that it shall be applied against any overdraft that may exist at the time. (pp. 419, 420.)

BANKS, Requiring to Account for Moneys Deposited by an Agent in His Own Name.—A bank cannot be held to account to the owner of a fund which has been deposited by an agent in his own name and applied on his overdraft, the bank having no knowledge of the agency. (pp. 420, 421.)

Adams & Adams, for the plaintiff in error.

Houston & Brooks, for the defendants in error.

⁵⁹⁸ **MASON, J.** On April 20, 1900, S. W. Kimmel, of Garber, Oklahoma, shipped to a Wichita commission firm, known as the Wichita Livestock Commission Company, a carload of hogs, with directions to sell, and to send him a draft for the net proceeds. The hogs were sold to Jacob Dold & Son on April 25th, and the commission company at once mailed to Kimmel its personal check on the Kansas National Bank, of Wichita, where they had had an account for several years, for one thousand and sixteen dollars and sixteen cents, that being the amount for which the sale was made, less the commission and expenses. Dold & Son paid for the hogs on April 26th with a check made payable to the order of the commission company, drawn upon another Wichita bank. The company at once indorsed the check and deposited it in ⁵⁹⁹ their bank, receiving credit upon their deposit account, and it was paid on the same day. Kimmel deposited the check sent him by the commission company with his local banker, and it was forwarded for collection through the ordinary banking channels, reaching Wichita on May 1st, when it was presented to the bank on which it was drawn, which refused payment. Kimmel then sued the

bank for the amount of the check, alleging that the deposit of the proceeds of the sale of the hogs was made without his authority and in violation of his instructions, and that the bank knew all the circumstances connected with the transaction. The bank answered, denying knowledge of the relations of plaintiff and the commission company, and alleging that when the Dold check was deposited the company's account was overdrawn more than that amount; that the overdraft had been permitted upon an agreement that it should forthwith be made good by deposits, and that the check, when deposited, was applied to such overdraft without notice of plaintiff's claim. Plaintiff replied with a general denial. Upon the trial, the court sustained a demurrer to plaintiff's evidence, and rendered judgment accordingly, which plaintiff now seeks to reverse.

The evidence was mainly directed to the question of the bank's knowledge of the commission company's business. Substantially the same facts were shown in this regard as in *Martin v. Kansas Nat. Bank*, 66 Kan. 655, 72 Pac. 218, which grew out of a similar claim against the same bank made by another shipper. Here, as in that case, an effort was made to show such intimate relations between the bank and the commission company as to justify charging the former with actual or constructive notice of plaintiff's interest in the check deposited by the latter. In fact, however, little more ^{was} shown than that the bank knew that the company was engaged in the commission business and that their account was sometimes overdrawn. The evidence on this point, being stated in some detail in the *Martin* case, will not be further reviewed. Following the conclusion reached in that case, we hold that the bank must be deemed not to have had notice of the relation of the commission company to the shipper.

Plaintiff claims that the record does not show that the account of the commission company was overdrawn to the amount of the Dold check at the time it was deposited. The evidence in this regard is not as full as might be desired, but we think that, upon the consideration of the entire testimony, it sufficiently appears that such was the fact. Indeed, it is perhaps to be inferred that the overdraft was allowed to be created in virtue of a statement by the commission company that they had funds ready to deposit against it, having reference to this very check. The question incidentally suggested in *Martin v. Kansas Nat. Bank*, 66 Kan. 655, 72 Pac. 218, is therefore fairly
ented: Can a bank be held to account to the owner of a

fund which has been deposited by an agent in his own name and applied upon the agent's overdraft, the bank having no knowledge of the agency? The strongest case cited in support of the contention of plaintiff in error for an affirmative answer to this question is that of Cady v. South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906; 49 Neb. 125, 68 N. W. 358. The third paragraph of the syllabus reads:

"F., a commission merchant, deposited in bank money realized from the sale of livestock consigned to him by C., his account with the bank being at the time largely overdrawn. Held, regardless of the question of notice, that the bank is accountable to C., and ⁶⁰¹ that it cannot apply the money so deposited in satisfaction of F.'s indebtedness."

Under the evidence in that case, as stated in the opinion, it might well have been said that the bank was chargeable with notice, but no account was taken of this fact as a basis for the conclusion reached. In the opinion a number of cases are cited, one of which, Davis v. Panhandle Nat. Bank (Tex. Civ. App.), 29 S. W. 926, seems to be entirely in point, holding that, where an agent deposits the money of his principal in his own name, the bank cannot hold it for the debt of the agent, although it has no knowledge of the agency, unless it would otherwise lose its claim. No authorities are cited or arguments presented in support of this conclusion, the opinion merely stating that the court did not see upon what principle the bank should be allowed to retain the money, and that it was perfectly manifest that it had no right to do so. A brief review of the other cases cited will show that they do not go as far as the Nebraska decision.

In Pennell v. Deffell, 4 De Gex, M. & G. 372, it was held that trust funds deposited by a trustee in his own name together with money of his own could be followed by the beneficiary; but the controversy was between the beneficiary and the executors of the trustee, the bank making no claim. In Van Alen v. American Nat. Bank, 52 N. Y. 1, the bank likewise made no claim to the money in controversy, and it was held that it could be required to pay it to the real owner, although it was deposited in the name of another, who gave the real owner a check for it. The questions discussed were purely technical. In Burtnett v. First Nat. Bank of Corunna, 38 Mich. 630, an agent deposited funds of his principal in his own name. Some six months later he died, and the bank then

attempted to apply ⁶⁰² the deposit to a debt of the decedent, the character of which is not shown in the reported decision. It was held that this could not be done, the case turning upon the fact that the agent never authorized the money to be applied to his debt. In *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 36 Minn. 75, 30 N. W. 440, it was merely held that money obtained by a bank by fraud could be recovered by the real owner, although it had passed through several hands. In *Peak v. Ellicott, Assignee*, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499, the money involved was not paid to the bank as a deposit, but for a specific purpose, and, as this was not performed, it was held that on the insolvency of the bank it should go to the owner and not to the general creditors. In *Baker v. New York Nat. Ex. Bank*, 100 N. Y. 31, 53 Am. Rep. 150, 2 N. E. 452, it was held that a bank having notice of the trust character of a fund deposited by a firm in its own name with the addition of the word "agent" could not apply it to the debt of the firm.

In *Whitley v. Foy*, 6 Jones Eq. (N. C.) 34, 78 Am. Dec. 236, the bank had actual notice that money deposited in the name of one person was owned by another; moreover, the controversy was between the real owners and the administrators of the depositor. In *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. ed. 693, and *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. Rep. 118, 34 L. ed. 724, the facts were held to give the banks notice of the trust character of the deposits involved. *First Nat. Bank v. Hummel*, 14 Colo. 259, 20 Am. St. Rep. 257, 23 Pac. 986, 8 L. R. A. 788, cited on rehearing, *Cady v. South Omaha Nat. Bank*, 49 Neb. 125, 68 N. W. 358, was another controversy between the beneficial owner of a trust fund and the administrators of the trustee. In *Hutchinson v. President etc. of Manhattan* ⁶⁰³ *Co.*, 9 Misc. Rep. 343, 29 N. Y. Supp. 1103, a check was deposited by an agent for collection only, and it was held that the bank could not hold it for the debt of the agent, because this was contrary to the intention of all the other parties in interest, including the agent. The decision, moreover, was reversed by the court of appeals: *Hutchinson v. President etc. of Manhattan Co.*, 150 N. Y. 250, 44 N. E. 775. In *Clemmer v. Drivers' Nat. Bank*, 157 Ill. 206, 41 N. E. 728, the bank knew of the trust character of the deposit. These are all the cases cited on this branch of the case by the Nebraska court.

The same doctrine is announced in 2 Morse on Banks and Banking, 4th ed., section 590, citing this case, that of Burtnett v. First Nat. Bank of Corunna, 38 Mich. 630, which has already been commented upon, and Cook v. Tullis, 18 Wall. 332, 21 L. ed. 933, which only declares the right of the real owner of property to hold it against the trustees in bankruptcy of one to whose care it had been confided.

Plaintiff in error also cites Farmers' and Merchants' Bank v. Farwell, 58 Fed. 633, 7 C. C. A. 391. Expressions are found in the opinion in that case favorable to his contention, but the decision turned largely upon the fact that the money sought to be held by the bank did not reach it by any act of its debtor, or even with his knowledge, but was deposited in his name by his attorney through mistake.

A conclusion different from that of the Nebraska court is reached in Smith v. Des Moines Nat. Bank, 107 Iowa, 620, 78 N. W. 238, where the authorities bearing upon the matter are collected and reviewed. The scope of the opinion is indicated by a paragraph of the syllabus, reading as follows: "A cestui que trust cannot recover trust moneys which were deposited in a bank by the trustee in his own ⁶⁰⁴ name and which, without notice of their trust character, the bank applied to a matured individual note of the trustee, surrendering the note to the latter."

We think this decision is in accordance with the weight of authority and with the better reason. The facts there presented differ in no material respect from those now under consideration, except that the depositor expressly agreed that the bank might apply the deposit to his debt, and the bank surrendered the note which evidenced it. Where a depositor carries an account with a bank as a part of his usual business, continually drawing checks and making deposits, sometimes having a balance to his credit and sometimes being overdrawn, it seems clear that the mere act of making a deposit is equivalent to an agreement that it shall apply against any overdraft that may exist at the time. Presumptively, that would seem to be the very purpose of the deposit.

"It has long been settled that a banker who has advanced money to another has a general lien on all securities of the latter which are in his hands, for the amount of his general balance, unless such securities were delivered to him under a particular agreement limiting their application": Wood v. Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366.

"When a depositor opens an account in a bank, that very act, in the absence of an agreement to the contrary, authorizes the appropriation of his deposit balance to any matured claims the bank may hold against him, the same as if he then executed an agreement in writing to that effect": *Meyers v. New York County Nat. Bank*, 36 App. Div. 482, 484, 55 N. Y. Supp. 504.

But if the general rule were otherwise, the circumstances of this case, already stated, would amount to an authority to the bank from its customer to apply the deposit to the overdraft. And there seems no just ⁶⁰⁵ ground for making a distinction for any purpose here involved between the payment of a past due debt that is evidenced by a note and the payment of one that is a mere matter of book account. No such distinction is made where the question relates to the consideration for the transfer of negotiable paper: *Draper v. Cowles*, 27 Kan. 484; *Mann v. National Bank*, 30 Kan. 412, 1 Pac. 579. Indeed, the very principle of protection to the innocent purchaser of commercial paper is invoked by defendants in error. The check deposited in this case was a negotiable instrument. The substantial controversy is as to its ownership. The bank acquired it from one who had the apparent title, without notice of any other claim. The argument that these considerations are sufficient to sustain the defendant's position seems sound. But the business was conducted as a cash transaction. The commission firm might have collected the Dold check themselves and deposited the cash in the bank, and the question presented would not have been materially different. The principle upon which transfers of negotiable instruments in payment of and even as security for existing debts are upheld is the desirability of promoting their currency: *Birket v. Elward*, 68 Kan. 295, ante, p. 405, 74 Pac. 1100, 64 L. R. A. 568. Surely no greater currency should be given to notes and bills than to actual money.

"The rule has been settled by a long line of cases, that money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it bona fide and for a valuable consideration in due course of business. . . .

"It is said that the case is to be governed by the doctrine established in this state that an antecedent debt is not such a consideration as will cut off the equities of third parties in negotiable securities obtained by fraud. But no case referred to where this doctrine has been applied to

*** money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no earmark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world": *Stephens v. Board of Education*, 79 N. Y. 183, 186, 187, 35 Am. Rep. 511.

"If a trustee or other fiduciary person, in violation of his own duty, uses trust money to pay an antecedent debt of his own to a creditor who has no notice of the breach of trust, or that the money is subject to the trust, in such a manner that the money is received as a general payment, and not as a distinct and separate fund, then the money becomes free from the trust, and cannot be followed by the beneficiary into the hands of the creditor, although, in general, an antecedent debt does not constitute a valuable consideration": *Pomeroy's Equity Jurisprudence*, 2d ed., sec. 1048.

In addition to the authorities cited in *Smith v. Des Moines Nat. Bank*, 107 Iowa, 620, 78 N. W. 238, see *First Nat. Bank v. Valley State Bank*, 60 Kan. 621, 57 Pac. 510, *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316, *Holly v. Missionary Soc.*, 180 U. S. 284, 21 Sup. Ct. Rep. 395, 45 L. ed. 531, and *Meyers v. New York County Nat. Bank*, 36 App. Div. 482, 484, 55 N. Y. Supp. 504. The syllabus in the last-named case reads: "A bank, having previous authority to apply a customer's deposit to his debt, can appropriate it to the debt, though the deposit was in part money of the depositor's ward, the bank having no knowledge of the fact."

We think that a bank which receives from an agent for deposit in his own name the money of his principal, without notice of the agency, is protected in applying it to a past due debt of the depositor to the same extent as in paying it out upon his check, whenever such application is authorized by the agent, either expressly or by legal implication, and that such authority ordinarily arises from the making of a deposit upon an overdrawn account when no other directions are given.

The judgment is affirmed.

All the justices concurring.

Whenever Money is Placed on Deposit, and neither the bank nor any of its officers are aware that it does not belong to the depositor, the bank, by paying out the money on the depositor's check, frees itself from all liability therefor, though it turns out that the money belongs to another: *Duckett v. National Mechanics' Bank*, 86 Md. 400, 63 Am. St. Rep. 513. Payment to an administrator of a depositor, in whose name moneys are deposited in trust for another, is good and effectual to discharge the bank, in the absence of notice from the beneficiary: *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 15 Am. St. Rep. 494.

HANSON v. KREHBIEL.

[68 Kan. 670, 75 Pac. 1041.]

LIBEL, Damages for, General and Special.—The common law recognizes two classes of damages for libel—general and special. General damages are those which the law presumes must naturally, proximately, and necessarily result from the publication of the libelous matter. (p. 424.)

CONSTITUTIONAL LAW.—The Words "Law of the Land" and "Due Process of Law" mean the orderly procedure of courts in the ascertainment of damages for an injury, to the end that the injury suffered shall have a remedy proper and adequate. (p. 425.)

LIBEL, Constitutionality of Statute Impairing the Right to Recover for.—A statute declaring that before any civil action shall be brought for libel published in a newspaper, the plaintiffs must serve a notice on the publisher specifying the statement alleged to be false and defamatory, and that if it appears the libel was published in good faith, and its falsity was due to mistake or misapprehension of the facts, and that a retraction has been published within a time specified, the plaintiff shall recover actual damages only, and that the words "actual damages" "shall be construed to include all damages that the plaintiff shall show that he has suffered in respect to his property, business, trade, profession, or occupation, and damages whatever," is unconstitutional, because it takes the injured person the right of remedy by due course of law for himself. (pp. 427, 428.)

CONSTITUTIONAL LAW—Statute Void in Part, When Void as a Whole.—A statute requiring persons who have been libeled in a newspaper to give notice to the publisher, specifying the statement claimed to be libelous, and if it was published in good faith and through a misapprehension, and a retraction is published within a time specified, no recovery can be had except for damages suffered in respect to property, business, trade, or profession, must be regarded as unconstitutional and void as a whole, though the legislature might require the service of a notice in order to give the publisher an opportunity by retraction to mitigate general or relieve himself from punitive damages. (p. 428.)

John F. Hanson, for the plaintiff in error.

P. J. Galle, for the defendants in error.

671 CUNNINGHAM, J. Plaintiff's action was for the recovery of damages occasioned by the publication of an alleged libel. The question of greatest moment involved is the constitutional validity of chapter 249 of the Laws of 1901 (Gen. Stats. 1901, c. 57b), which reads as follows:

"Section 1. That before any civil action shall be brought for the publication or circulation of a libel in any newspaper in this state, the plaintiff shall, at least three days before filing the petition in such action, serve notice on the publisher or publishers of such newspaper, at the principal office of publication, specifying the statement in said article which is alleged to be false or defamatory. If it shall appear on the trial of such action that said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein contained alleged to be erroneous was published in the next regular issue of said newspaper, if a weekly or monthly, or, in case of a daily paper, within three days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous a place and type in such newspaper as was the article complained of as libelous, then the plaintiff in such case shall recover only actual damages; provided, that the provisions of this act shall not apply to the case of any libel against any candidate for a public office in this state unless the retraction is made editorially, in a conspicuous manner, at least ten days before election, in case such libelous article was published in a daily paper, and in case such libelous article was published in a weekly or monthly paper, at least fifteen days before the election; provided further, that nothing in this act shall be held to apply to any libel published of or concerning any female person.

"Sec. 2. The words 'actual damages' in the foregoing section shall be construed to include all damages which ⁶⁷² the plaintiff shall show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever."

This is assailed as being violative of section 18 of the Bill of Rights, which reads: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

It will be noted that the statute questioned limits the right of recovery in cases of libel to actual damages where, after service of the notice provided in the first section, the publisher of the newspaper in which the libelous matter has appeared makes a full and fair retraction, coupled with a showing upon the trial that it was published in good faith, under a misapprehension of the facts. This statute also declares that class of damages to be such as the plaintiff has suffered in respect to his property, business, trade, profession, or occupation. So that, in such cases, the libeled party may not recover all his damage, but is confined to the narrow class defined and designated in the act as actual damages.

The common law recognizes two classes of damages in libel cases—general and special. General damages are those which the law presumes must naturally, proximately and necessarily result from the publication of the libelous matter. They arise by inference of law and are not required to be proved by evidence. They are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss has, in fact, resulted, and are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon ⁶⁷³ the malicious publication of false and libelous matter. The injuries for which this class of damages is allowed are something more than merely speculative. While not susceptible of being accurately measured in dollars and cents, they are real injuries, and often more substantial and real than those designated as actual, and measured accurately by the dollar standard. In short, they are such injuries to the reputation as were contemplated in the bill of rights. The law presumes that this class of injuries results necessarily from the publication of the libelous matter, and the damages, therefore, are recoverable without special assignment. Special damages, also recoverable when properly

pleaded and shown, are such damages as are computable in money, and may be said fairly to be embraced in the list of actual damages, as given in the statute referred to. This is the present condition of the law, as it was also at the time of the adoption of our constitution, and these are the injuries to reputation, for which it provided that there should be "remedy by due course of law."

It requires no argument to demonstrate that the act in question denies a remedy for some of these injuries. Unless the one libeled has suffered in the particular manner pointed out in the statute, he is without remedy. For that large class of persons and still larger class of injuries not falling within the provisions of this statute, no remedy is found. From the writings of the world's wisest man we have the assurance that "a good name is rather to be chosen than great riches"; yet the possessor of this thing of greatest value, being despoiled of it, is left by the statute in question entirely without remedy for its loss, except in such rare cases where he may be able to show some exact financial injury in the particulars ⁶⁷⁴ named. We could not excuse ourselves for holding that reputation is less valuable than property, or that by the quoted provision of the Bill of Rights it is less protected from spoliation.

It is suggested that the retraction required by the act to be published is a fair compensation for the injury done, and a reinvestment of the libeled one with his good name; that, this being done, nothing more could be accomplished by a verdict of a jury, and, hence, that the retraction required by the legislative enactment, if not "due course of law," is an ample substitute for it.

It is not an easy matter to deduce, either from reason or the authorities, a satisfactory definition of "law of the land" or "due course of law." However from either standpoint, we feel safe in saying that these terms do not mean any act that the legislature may have passed, if such act does not give to one an opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford a like opportunity to show the extent of his injury and gives no adequate remedy to recover therefor. Whatever more than this these terms may mean, they do mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one "shall have remedy"; that is, proper and adequate remedy, thus to be ascertained. To refuse hearing and remedy for injury after its infliction is

a principle little removed from that of the infliction of penalty before and without hearing. In *Hoke v. Henderson*, 4 Dev. (15 N. C.) 1, 15, 25 Am. Dec. 688, Chief Justice Ruffin, in speaking of this point, said:

"Those terms 'law of the land' (or due course of law) do not mean merely an act of the general assembly. ⁶⁷⁵ If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be 'taken, imprisoned, disseised of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed; and be deprived of his property, his liberty, and his life,' without crime? Yet all these he may suffer, if an act of assembly simply denouncing those penalties on particular persons, or a particular class of persons, be in itself a law of the land within the sense of the constitution."

Mr. Webster, in the *Dartmouth College* case, gives this definition: "By the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. . . . Everything which may pass under the form of an enactment is not, therefore, considered to be the law of the land": *Dartmouth v. Woodward*, 4 Wheat. 519, 581, 4 L. ed. 629.

For other definitions, see *People v. Supervisors*, 70 N. Y. 228; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794; *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948, 24 L. R. A. 152; *Chicago etc. Ry. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624, 41 L. R. A. 481.

The retraction required by the act in question may or may not be full reparation for the injury suffered. It might rather aggravate the injury already inflicted than mollify it. It is sufficient to say, however, that these are all questions for the courts, upon proper notice to all parties, and may not be determined arbitrarily by an act of the legislature. We find that courts of last resort in two states have passed upon ⁶⁷⁶ the constitutionality of acts like the one here discussed. In *Park v. Free Press Co.*, 72 Mich. 560, 565, 16 Am. St. Rep. 544, 40 N. W. 731, 1 L. R. A. 599, the supreme court of Michigan, holding against the constitutionality, said:

"We do not think the statute controls the action, or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It

purports to confine recovery in certain cases against newspapers to what it calls 'actual damages,' and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is under this law usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. There could never be any loss when employers or customers know or believe the charges unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill-will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without ⁶⁷⁷ the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable.

"There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief."

This case was subsequently specifically approved by the same court in *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21, where the court said: "The right to recover in an action of libel for damages to reputation cannot be abridged by statute."

A contrary view was adopted by a divided court in *Allen v. Pioneer Press Co.*, 40 Minn. 117, 12 Am. St. Rep. 707, 41 N. W. 936, 3 L. R. A. 532. The conclusion of the court in ^{††}

case is based largely upon the reasoning that the retraction, being required to be published as widely and to substantially the same readers as the original, is usually a more complete redress for the injury inflicted than a judgment for damages would be. This, however, is merely an assumption, and may or may not be true; but even if true it would not be a "remedy by due course of law," as contemplated in the constitution, as we have already determined. We are well persuaded that the act criticised takes from the libeled person the right of remedy by due course of law for an injury suffered in his reputation, and hence is invalid, under the constitutional provision quoted.

The questions in this case arise upon the sustaining of defendant's general demurrer to plaintiff's petition. The petition contained no statement of the service of ^{etc} the notice as provided in the criticised act, and it is now claimed that, admitting the constitutional invalidity of this act, because it denies remedy by due course of law, still the legislature would have a right to require the service of this notice as a step in the procedure in prosecuting an action for the recovery of damages occasioned by libel, in order to give the publisher the opportunity of retraction for the purpose of mitigating general damages and relieving himself from punitive damages. We do not deny that the legislature might do this. It seems to us, however, that such was not its purpose and object, but rather that the service of this notice was merely a step in the procedure to relieve publishers from all general damages. That object having been found unconstitutional, the ancillary matters must go with it.

It is further suggested that the subject matter of the alleged libel was not libelous per se, and, hence, that the demurrer was properly sustained, the petition containing no allegation of special damages. The libelous matter set out was in the following language:

"A second case was called late this afternoon, in which John F. Hanson of Marquette, is accused of assault on M. A. Fosberg and Louise Fosberg. It is claimed that in attempting to collect a bill he threatened violence with a pistol. The latter parties are the complaining witnesses. The decision of the case will be announced later."

A libel, in order to be actionable per se, and to permit a recovery without allegation and proof of special damages, must imputations which tend to subject the libeled one to dis-

grace, ridicule or contempt. We are of the opinion that the words here complained of are such. To threaten violence with a pistol might fairly be held to be a sufficient charge, ^{etc} at least, of an assault, and possibly of a crime of greater gravity.

We find that the court was in error in sustaining defendant's demurrer, and therefore direct that such ruling be reversed, and the case remanded for further proceedings.

All the justices concurring.

The Right of Full Legal Protection to private character from libelous assault can no more be removed by statute than such protection to life, liberty, or property: *Park v. Detroit Free Press Co.*, 72 Mich. 560, 16 Am. St. Rep. 544. See, however, *Allen v. Pioneer Press Co.*, 40 Minn. 117, 12 Am. St. Rep. 707.

GOODRICH v. MITCHELL.

[68 Kan. 765, 75 Pac. 1034.]

CONSTITUTIONAL LAW—Statute Giving Preference to Veterans.—A statute declaring that persons who have served in the army or navy in the War of the Rebellion, and been honorably discharged therefrom, shall be preferred for appointment for employees to positions in every public department and upon all public work of the state and of the cities and towns therein over persons of equal qualifications, is constitutional. (p. 436.)

David Overmeyer and Thomas Dever, for the plaintiff in error.

M. T. Campbell, for the defendant in error.

⁷⁰⁵ **JOHNSTON, C. J.** H. K. Goodrich and Porter Mitchell are each claiming the office of superintendent of the electric-light plant of Topeka. The term of this office is two years, and there is a provision that all officers of the city shall hold their offices until their successors are elected and qualified. Goodrich was duly chosen as superintendent and continued to act in that capacity until April, 1903, which was the end of the term, as fixed by ordinance. He then applied to the mayor and council of the city for appointment to the next regular term, and Mitchell made a like application. These were the only applicants for the place, and it is agreed that both are men of good reputations, are equally competent to perform "

duties of the office, and equally eligible for appointment, unless Goodrich has a right to be preferred because of services and honorable discharge from the army of the War of the Rebellion. Goodrich was a soldier in that war and received an honorable discharge, while Mitchell never served in the army or navy at any time. With a knowledge of these facts, the mayor and council appointed Mitchell to this office, but the refusal to appoint Goodrich was not because he was lacking in qualifications, fitness, or eligibility, nor because Mitchell possessed any superior qualifications for the office. After Mitchell was appointed and had qualified, he demanded the possession of the office, and, when Goodrich declined to surrender it, Mitchell took forcible possession and ousted Goodrich therefrom.

⁷⁶⁷ It is conceded that the result of this proceeding and the right to the office in this contest depend upon the constitutionality of an act spoken of as the "veterans' preference law." It provides:

"That section 1 of chapter 160 of the Laws of 1886 be and is hereby amended so as to read as follows: In grateful recognition of the service, sacrifices and sufferings of persons who served in the army and navy of the United States in the War of the Rebellion and have been honorably discharged therefrom, they shall be preferred for appointment and employed to positions in every public department and upon all public works of the state of Kansas, and of the cities and towns of this state, over other persons of equal qualifications, and the person thus preferred shall not be disqualified from holding any position in said service on account of his age or by reason of any physical disability, provided such age or disability does not render him incompetent to perform the duties of the position applied for; and when any such ex-soldier or sailor shall apply for appointment to any such position, place or employment, the officer, board or person whose duty it is or may be to appoint a person to fill such place shall, before appointing anyone to such position, make an investigation as to the qualifications of said ex-soldier or sailor for such employment, and if he is a man of good reputation, and can perform the duties of said position so applied for by him, said officer, board or person shall appoint said ex-soldier or sailor to such position, place or employment": Laws 1901, c. 186, sec. 1; Gen. Stats. 1901, sec. 6509.

Other provisions are that a like preference shall be given if it becomes necessary to reduce the force in any of the depart-

ments, cities or towns of the state, and penalties are also declared against those who willfully refuse or neglect to obey the provisions of the act.

The fundamental infirmity in the act is not specifically pointed out. It is said to be unequal and arbitrary ⁷⁶⁸ in its operations; that the preference given to veterans necessarily restricts the privileges of others, and that it is given as reward for past services, without regard to the public service or the general welfare of the people. It is not contended that the act conflicts with any express provision of the state or federal constitutions, but, rather, that it is contrary to the implications and spirit of our constitution.

The general doctrine is that, in the absence of constitutional limitations, the legislature may prescribe how and by whom offices shall be filled. There is no contract right or property interest in an office, and hence some of the constitutional principles invoked have no application. An office is a public agency, and an officer is a mere agent of the public, entitled to exercise the functions and perform the duties of the office for the public benefit and not for his own. The main consideration in the selection of officers and agents is the public welfare, and the state, like any other principal, may select its agents; may determine for itself who can best accomplish its purpose and whose appointment will best subserve the public good. When the constitution prescribes a method or imposes a limitation, the legislature is to that extent guided and controlled in choosing its officers; but no provision has been called to our attention which prohibits the giving of a preference to veterans of the Civil War. Constitutional limitations are prescribed with respect to eligibility and the holding of office, and among them is the provision that a member of Congress, or officer of the state or of the United States, cannot hold the office of governor: Const., art. 1, sec. 10. Neither is a United States officer eligible to a seat in the legislature: Const., art. 2. sec. 5. Justices of the supreme court and judges of the district court cannot ⁷⁶⁹ hold any other office during the terms for which they are elected: Const., art. 3, sec. 13. Persons who are under guardianship, have been convicted of a felony, have defrauded the government, have given or received a bribe or offered to do so, have voluntarily borne arms against the government, with some exceptions, cannot hold office. Anyone who gives or accepts a challenge to fight a duel, or who carries a challenge to another, or who goes out of the state to fight a duel, is ineligible for office, and everyone

who has given or offered a bribe to secure his own election is disqualified from holding office during the term for which he has been elected: Const., art. 5, secs. 2, 5, 6. In the main, these are the provisions affecting the holding of office, and aside from these restrictions the whole matter is committed to the legislature by section 1 of article 15, wherein it is provided that: "All officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law."

It is conceded that the matter of holding office is a political privilege, but it is argued that it becomes a special privilege when a class of citizens are given a preference over all others. Our constitution differs materially from those of many of the states with respect to the granting of privileges. The only provision we have touching the subject is found in section 2 of the Bill of Rights, which is: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the same body; and this power shall be exercised by no other tribunal or agency."

⁷⁷⁰ In most of the states the granting of special privileges or immunities is expressly prohibited; but, as will be observed, ours seemingly contemplates that such privileges may be granted, as it provides that none shall be granted that may not be altered, revoked, or repealed. The legislature may, then, exercise its judgment and discretion in the selection of officers, unhampered by restrictions, unless some are to be implied from those expressed or from the theory of our government. As an office is a public trust, to be held and exercised for the public benefit, it is always implied, perhaps, that officers shall be chosen with a view to carrying out that purpose. So it is said that a law permitting the selection of persons unfit for the office and unable to perform its duties is defective. In *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005, 32 L. R. A. 253, it was, in effect, held that, in the absence of constitutional restrictions, the legislature had power to select officers at will, or to confer power of appointment on boards or officers; but that the appointment of a person or a class in preference to all others, without inquiry or determination whether the person appointed is actually qualified to perform the duties of the office, is inconsistent with the nature of our government. It was, therefore, held that a statute, making the appointment of vet-

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Nor is there any novelty in our legislation on the subject, as like preferences have been given by the ⁷⁷¹ legislatures of a great many states and by the Congress of the United States, and, except where the acts have been drawn so as to conflict with express constitutional provisions, they have been generally upheld. The supreme court of Massachusetts, in response to questions by the governor and council, held that the provisions of a civil service statute giving to veterans the preference for appointment to offices that they were found competent to fill, were constitutional. And the same view was expressed with reference to a provision giving a preference in public employments. It was said: "We doubt whether a statute, which purports to compel the commonwealth and its cities and towns to employ in the labor service persons who are not able to perform the labor, and to pay them wages as laborers, could be held to be either wholesome or reasonable. But if the section means that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and towns in preference to all other persons except women, if the veterans are found competent to perform the labor, we think the enactment is within the constitutional power of the general court": *In re Opinion*, 166 Mass. 589, 596, 44 N. E. 625, 34 L. R. A. 58. See, also, *In re Opinion*, 145 Mass. 587, 13 N. E. 15; *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142; *In re Sweeley*, 33 N. Y. Supp. 369; *Matter of Stutzbach v. Coler*, 168 N. Y. 416, 6 N. E. 697; *In re Wortman*, 2 N. Y. Supp. 324; *Matter of McGuire*, 57 N. Y. Sup. Ct. 203, 2 N. Y. Supp. 760; *State v. Miller*, 66 Minn. 90, 68 N. W. 732; *Townsend v. Baughner*, 55 N. J. L. 381, 26 Atl. 808; *Throop on Public Officers*, secs. 95-98; 6 Am. & Eng. Ency. of Law, 2d ed., 93.

State of Iowa v. Garbroski, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. ⁷⁷² 959, 56 L. R. A. 570, is cited as an authority against the validity of a preference to veterans. That was a case where there was an attempted exemption of persons who had served in the army and navy from the payment of a license

tax. That act, which affected liabilities and imposed burdens, gave rise to a very different question than the one presented here. It was held to be a discrimination in violation of the fourteenth amendment to the federal constitution, and a denial of the equal protection of the laws. Even in that case it was remarked that "possibly a veteran soldier or sailor would be preferred, everything else being equal, for civil office, because of superior fitness, resulting from discipline of service in war; for 'it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state.' But the work of a peddler calls for no qualities such as a soldier or sailor acquires in the service." *State v. Shedroi*, 75 Vt. 277, 98 Am. St. Rep. 831, 54 Atl. 1081, involved the same question and was decided in the same way.

Office holding is a political privilege, and the matter of appointment to office is not affected by the fourteenth amendment or other provision of the federal constitution, and, as has been said, the power of the legislature is supreme in respect to appointments, save as the constitution has limited it. Already statutes have been enacted which limit the number from whom officers may be chosen, and necessarily put others who might desire these offices at a disadvantage. There are boards upon which only physicians can be appointed; others to which only dentists are eligible; others where architects or skilled mechanics have the preference; others where a woman is arbitrarily ⁷⁷³ appointed; and still others where political opinions enter into the qualifications of members—that is, enactments that members of boards shall be taken in certain proportions from different political parties. These acts are generally held to be within the legislative power, and the preferences and the exclusions so made to be reasonable and valid. Where the limitation from which officers shall be chosen is manifestly for the public good, and where the purposes sought and the ends attained in legislation in regard to the qualifications for office are the safety and welfare of the public, it cannot be said that the rights of any others are unduly affected or prejudiced.

If we should lay aside the gratitude, mentioned in the first part of the section in question, for those who sacrificed and suffered in defense of the nation, there are reasonable and substantial considerations for making a preference in favor of the veterans. The love of country that induced them to fight for its existence and defend its institutions is some assurance, at least,

of loyalty and fidelity in the civil service. In the nature of things, the discipline of the army and navy tended to promote promptness, respect for authority and obedience to law, courage to meet difficulties and overcome selfish and sinister influences, steadiness of purpose, perseverance, and devotion to duty. These considerations may very well have appealed to the discretion and judgment of the legislature in determining who could render the best service to the public, and we see no reason why they are not reasonable and sufficient. In the civil service laws of the country, conceded to be beneficial and valid, a preference is given because of the former experience in the public service, and why should not the public service of those who imperiled their lives in the defense of their country ⁷⁷⁴ receive like recognition and preference? As counsel for the plaintiff has well said: "A grateful recognition of the service, sufferings and sacrifices of persons who have served the state in war has always been recognized by all nations as the exercise of the highest public policy, as the surest guaranty of the future safety, honor and welfare of the state."

In *Keim v. United States*, 177 U. S. 290, 20 Sup. Ct. Rep. 574, 44 L. ed. 774, the preference law enacted by Congress was considered and interpreted, but its constitutionality seems to have been conceded, as no attack was made upon its validity. Judge Brewer, in deciding it, remarked that, "No thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army or navy." That such service afforded reasonable grounds for preference in public offices and employments was recognized in *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005, 32 L. R. A. 253, where it was remarked:

"It may be said that, other qualifications being equal, there are reasons to believe that a veteran soldier or sailor often will make a better civil officer than a person who never has been subjected to the discipline of service in war, and it is distinctly a public purpose to promote patriotism and to make conspicuous and honorable any exhibition of courage, constancy and devotion to the welfare of the state shown in the public service. These things we assume the legislature may take into account in providing for appointments to office where the qualifications are not prescribed by the constitution."

The court, in *Re Opinion*, 166 Mass. 589, 596, 44 N. E. 625, 34 L. R. A. 58, in speaking of the belief that faithful service in and honorable discharge from the War of the Rebel-

lion developed such qualifications of character in men that it was to the ⁷⁷⁵ interest of the commonwealth to appoint them to office in preference to others, said:

"The general court may have so thought, on the ground either that such a person would be likely to possess courage, constancy, habits of obedience, and fidelity, which are valuable qualifications for any public office or employment, or that the recognition of the services of veterans in the way provided for by the statute would promote that love of country and devotion to the welfare of the state, which it concerns the commonwealth to foster. If such was the opinion of the general court, we cannot say that it was beyond its constitutional power to enact this section. Of the wisdom of such legislation we are not made the judges."

Faithful service and devotion to duty in the past have always been regarded as good consideration for preference or promotion in every department in life, public and private, and it belonged to the legislature to determine what qualifications and experience give the best assurance of faithful, honest and efficient public service. The case is quite unlike the one supposed, of a right to office by those affiliated with a particular church or a particular party, or because of some private achievement. The preference that is made here has its basis on services to the public and experience and fidelity in the public service, and we think it was within the constitutional power of the legislature to make such a preference.

It is conceded that the plaintiff possessed every qualification, and was entitled to reappointment as against the defendant, who was the only other applicant for the position. The mayor and council were, therefore, required to give the plaintiff the preference, and under the circumstances had no power or authority to appoint the defendant. The plaintiff, being in the office, was entitled to continue until some one was legally appointed, ⁷⁷⁶ and, therefore, had a right to bring a proceeding in quo warranto to obtain the possession of the office.

Judgment will therefore be given in favor of the plaintiff.

All the justices concurring.

The Decision in the Principal Case seems opposed to *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357; *State v. Gabroaki*, 111 Iowa, 406, 82 Am. St. Rep. 524; *State v. Shedroi*, 75 Vt. 277, 98 Am. St. Rep. 825.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

**EICHORN v. NEW ORLEANS AND CARROLLTON RAIL-
ROAD, LIGHT AND POWER COMPANY.**

[112 La. 236, 36 South. 335.]

RAILROADS—Negligence—Measure of Care.—If a railroad company, in the management of its business, causes unusual peril to travelers, it must meet such peril with unusual precautions, and failing in this is guilty of negligence. (p. 442.)

RAILROADS—Negligence—Dangerous Crossings.—If a railroad crossing is especially dangerous to travelers, on account of its locality or mode of construction, or because the track is curved or the view obstructed, the railroad company must exercise such care and take such precautions as the dangerous nature of the crossing requires, and failing in this, is guilty of negligence. (p. 442.)

RAILROADS—Negligence—Regulations at Crossings.—In the absence of regulations imposed by statute or ordinance seeking to meet existing conditions at dangerous railroad crossings, the railroad company must make and enforce such regulations for the safety of travelers, and failing in this is guilty of negligence, and must abide the consequences. (p. 443.)

RAILROADS—Negligence of Trainmen—Dangerous Crossings. If trainmen have reason to believe that there are persons in exposed positions on the railroad track, as over unguarded crossings in populous districts in a city, or where the public are wont to cross on the track with such frequency and numbers as to be known to those in charge of the train, they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, and render the railroad company liable for injuries therefrom, although there was negligence on the part of the injured, and no fault on the part of the trainmen after seeing the danger. (p. 443.)

RAILROADS—Negligence—Traveler on Space Between Tracks. The general public is not called upon to know or observe at a glance that the space between parallel railroad tracks in a city is not wide enough to afford protection to a person standing on such space, or to know the length and width of the cars upon the tracks, and such person has a right to assume that such space is sufficient and that it

is not likely that two moving cars will pass each other while he is in that position, but that one of them will stop before reaching him. (p. 446.)

Dart & Kernan, for the appellant.

G. J. Untereiner and B. R. Forman, for the appellee.

²³⁸ NICHOLLS, C. J. The plaintiff, as widow of Ludwig Eichorn, seeks in this action to recover from the defendant the sum of fifty thousand dollars, with legal interest, because, as she alleged, through its negligence, unskillfulness, and want of care in laying its tracks on Baronne near Canal street, and operating its cars at said place on the 29th of January, 1902, it killed her husband, who was lawfully upon the public streets at that place, and without fault or negligence on his part.

She alleged in her petition that the tracks were laid at the place for much narrower cars, and, since the tracks were laid, the said company had bought and operated, and did on the 29th of January, 1902, operate at that place, cars much too wide for the space between the tracks—a fact unknown to Ludwig Eichorn, and not noticeable by an ordinary observer, but which, in the interest of the public safety, and with its engineers and instruments of precision, operating electric cars through the populous streets of this city, it was bound to know and guard against, and a reasonable care for the lives of the people required it, when it adopted the wider cars, and made it the duty of the company, to increase the space between the tracks.

2. It was negligent in the selection and employment of youths, too youthful and inexperienced, and careless motoneers in the operation of its cars, which caused the death of Ludwig Eichorn.

3. On the day in question he was crossing Baronne street at the usual place, near Canal street, and his way was stopped by a car standing across the passage, and while he was standing in what appeared to be a perfectly ²³⁹ safe place, waiting for the car which obstructed his passage to go forward, another car of said defendant company, coming in the opposite direction, carelessly and negligently, and without warning of its approach, and when the motoneer ought to have waited until the other car had passed, came on, and rolled and crushed the said Ludwig Eichorn between the said two cars, when he was not then on the track of either, but between the two, where he had a right to be, and to suppose he was perfectly safe.

The motoneer ought to have been warned by the officers of the danger of rolling a car at that place alongside of one on the

separate parallel track, which had not been done, or, if done, he negligently disregarded the safety of Ludwig Eichorn. The said company could have prevented the injury, and did not do so. Ludwig Eichorn was so crushed by the said two cars that he suffered great pain in body and mind for two days, and then died. Five thousand dollars is claimed for his own sufferings, and forty-five thousand dollars for petitioner's loss of his comfort and support. He was, previous to his negligent killing by defendant, in good health, and had a life expectancy of forty years, and his earnings were about three thousand dollars a year. In view of the premises, petitioner prayed that the said New Orleans and Carrollton Railroad, Light and Power Company be cited to appear and answer, and be condemned to pay petitioner fifty thousand dollars damages, with five per cent interest from judicial demand, and for costs, general relief, and trial by a jury.

Defendant excepted that plaintiff's petition was vague, general, and indefinite, and disclosed no just and legal cause of action, and the suit should be dismissed. The exceptions were overruled. The defendant then answered, pleading first the general issue. It denied that it was in any way liable for the injuries alleged to have been received by the husband of plaintiff, and averred that, if plaintiff's said husband ²⁴⁰ was injured as claimed in the petition, it was not through the fault and negligence of respondent, or any of its agents, servants, or employes, but, on the contrary, was entirely through the fault, negligence, and gross want of care of the plaintiff's said husband; but, in the event it should be shown there was a question of negligence, respondent pleaded that the said husband was guilty of contributory negligence.

Plaintiff, with leave of the court, filed a supplemental petition in which she alleged that she had been informed and believed, and so averred, that since the filing of her suit, the New Orleans Railways Company, a corporation doing business in this city, had acquired all the property of the New Orleans and Carrollton Railroad, Light and Power Company, and had assumed all of its liabilities, among which was petitioner's right to damages. That she reiterated and reaffirmed all the allegations of her original petition herein filed. She prayed that the New Orleans Railways Company be cited; that petitioner have judgment against it in solido with the New Orleans and Carrollton Railroad, Light and Power Company, with five per cent inter-

duties of the office, and equally eligible for appointment, unless Goodrich has a right to be preferred because of services and honorable discharge from the army of the War of the Rebellion. Goodrich was a soldier in that war and received an honorable discharge, while Mitchell never served in the army or navy at any time. With a knowledge of these facts, the mayor and council appointed Mitchell to this office, but the refusal to appoint Goodrich was not because he was lacking in qualifications, fitness, or eligibility, nor because Mitchell possessed any superior qualifications for the office. After Mitchell was appointed and had qualified, he demanded the possession of the office, and, when Goodrich declined to surrender it, Mitchell took forcible possession and ousted Goodrich therefrom.

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Office holding is a political privilege, and the matter of appointment to office is not affected by the fourteenth amendment or other provision of the federal constitution, and, as has been said, the power of the legislature is supreme in respect to appointments, save as the constitution has limited it. Already statutes have been enacted which limit the number from whom officers may be chosen, and necessarily put others who might desire these offices at a disadvantage. There are boards upon which only physicians can be appointed; others to which only dentists are eligible; others where architects or skilled mechanics have the preference; others where a woman is arbitrarily ⁷⁷³ appointed; and still others where political opinions enter into the qualifications of members—that is, enactments that members of boards shall be taken in certain proportions from different political parties. These acts are generally held to be within the legislative power, and the preferences and the exclusions so made to be reasonable and valid. Where the limitation from which officers shall be chosen is manifestly for the public good, and where the purposes sought and the ends attained in legislation in regard to the qualifications for office are the safety and welfare of the public, it cannot be said that the rights of any others are unduly affected or prejudiced.

If we should lay aside the gratitude, mentioned in the first part of the section in question, for those who sacrificed and suffered in defense of the nation, there are reasonable and substantial considerations for making a preference in favor of the veterans. The love of country that induced them to fight for its existence and defend its institutions is some assurance, at least,

of loyalty and fidelity in the civil service. In the nature of things, the discipline of the army and navy tended to promote promptness, respect for authority and obedience to law, courage to meet difficulties and overcome selfish and sinister influences, steadiness of purpose, perseverance, and devotion to duty. These considerations may very well have appealed to the discretion and judgment of the legislature in determining who could render the best service to the public, and we see no reason why they are not reasonable and sufficient. In the civil service laws of the country, conceded to be beneficial and valid, a preference is given because of the former experience in the public service, and why should not the public service of those who imperiled their lives in the defense of their country ⁷⁷⁴ receive like recognition and preference? As counsel for the plaintiff has well said: "A grateful recognition of the service, sufferings and sacrifices of persons who have served the state in war has always been recognized by all nations as the exercise of the highest public policy, as the surest guaranty of the future safety, honor and welfare of the state."

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"It may be said that, other qualifications being equal, there are reasons to believe that a veteran soldier or sailor often will make a better civil officer than a person who never has been subjected to the discipline of service in war, and it is distinctly a public purpose to promote patriotism and to make conspicuous and honorable any exhibition of courage, constancy and devotion to the welfare of the state shown in the public service. These things we assume the legislature may take into account in providing for appointments to office where the qualifications are not prescribed by the constitution."

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"The general court may have so thought, on the ground either that such a person would be likely to possess courage, constancy, habits of obedience, and fidelity, which are valuable qualifications for any public office or employment, or that the recognition of the services of veterans in the way provided for by the statute would promote that love of country and devotion to the welfare of the state, which it concerns the commonwealth to foster. If such was the opinion of the general court, we cannot say that it was beyond its constitutional power to enact this section. Of the wisdom of such legislation we are not made the judges."

Faithful service and devotion to duty in the past have always been regarded as good consideration for preference or promotion in every department in life, public and private, and it belonged to the legislature to determine what qualifications and experience give the best assurance of faithful, honest and efficient public service. The case is quite unlike the one supposed, of a right to office by those affiliated with a particular church or a particular party, or because of some private achievement. The preference that is made here has its basis on services to the public and experience and fidelity in the public service, and we think it was within the constitutional power of the legislature to make such a preference.

It is conceded that the plaintiff possessed every qualification, and was entitled to reappointment as against the defendant, who was the only other applicant for the position. The mayor and council were, therefore, required to give the plaintiff the preference, and under the circumstances had no power or authority to appoint the defendant. The plaintiff, being in the office, was entitled to continue until some one was legally appointed, ⁷⁷⁶ and, therefore, had a right to bring a proceeding in quo warranto to obtain the possession of the office.

Judgment will therefore be given in favor of the plaintiff.

All the justices concurring.

The Decision in the Principal Case seems opposed to Brown v. Russell, 166 Mass. 14, 55 Am. St. Rep. 357; State v. Gabroski, 111 Iowa, 496, 82 Am. St. Rep. 524; State v. Shedroi, 75 Vt. 277, 98 Am. St. Rep. 825.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

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ROAD, LIGHT AND POWER COMPANY.**

[112 La. 236, 36 South. 335.]

RAILROADS—Negligence—Measure of Care.—If a railroad company, in the management of its business, causes unusual peril to travelers, it must meet such peril with unusual precautions, and failing in this is guilty of negligence. (p. 442.)

RAILROADS—Negligence—Dangerous Crossings.—If a railroad crossing is especially dangerous to travelers, on account of its locality or mode of construction, or because the track is curved or the view obstructed, the railroad company must exercise such care and take such precautions as the dangerous nature of the crossing requires, and failing in this, is guilty of negligence. (p. 442.)

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is not likely that two moving cars will pass each other while he is in that position, but that one of them will stop before reaching him. (p. 446.)

Dart & Kernan, for the appellant.

G. J. Unterein and B. R. Forman, for the appellee.

²³⁸ NICHOLLS, C. J. The plaintiff, as widow of Ludwig Eichorn, seeks in this action to recover from the defendant the sum of fifty thousand dollars, with legal interest, because, as she alleged, through its negligence, unskillfulness, and want of care in laying its tracks on Baronne near Canal street, and operating its cars at said place on the 29th of January, 1902, it killed her husband, who was lawfully upon the public streets at that place, and without fault or negligence on his part.

She alleged in her petition that the tracks were laid at the place for much narrower cars, and, since the tracks were laid, the said company had bought and operated, and did on the 29th of January, 1902, operate at that place, cars much too wide for the space between the tracks—a fact unknown to Ludwig Eichorn, and not noticeable by an ordinary observer, but which, in the interest of the public safety, and with its engineers and instruments of precision, operating electric cars through the populous streets of this city, it was bound to know and guard against, and a reasonable care for the lives of the people required it, when it adopted the wider cars, and made it the duty of the company, to increase the space between the tracks.

2. It was negligent in the selection and employment of youths, too youthful and inexperienced, and careless motoneers in the operation of its cars, which caused the death of Ludwig Eichorn.
3. On the day in question he was crossing Baronne street at the usual place, near Canal street, and his way was stopped by a car standing across the passage, and while he was standing in what appeared to be a perfectly ²³⁹ safe place, waiting for the car which obstructed his passage to go forward, another car of said defendant company, coming in the opposite direction, carelessly and negligently, and without warning of its approach, and when the motoneer ought to have waited until the other car had passed, came on, and rolled and crushed the said Ludwig Eichorn between the said two cars, when he was not then on the track of either, but between the two, where he had a right to be, and to suppose he was perfectly safe.

The motoneer ought to have been warned by the officers of the danger of rolling a car at that place alongside of one on the

separate parallel track, which had not been done, or, if done, he negligently disregarded the safety of Ludwig Eichorn. The said company could have prevented the injury, and did not do so. Ludwig Eichorn was so crushed by the said two cars that he suffered great pain in body and mind for two days, and then died. Five thousand dollars is claimed for his own sufferings, and forty-five thousand dollars for petitioner's loss of his comfort and support. He was, previous to his negligent killing by defendant, in good health, and had a life expectancy of forty years, and his earnings were about three thousand dollars a year. In view of the premises, petitioner prayed that the said New Orleans and Carrollton Railroad, Light and Power Company be cited to appear and answer, and be condemned to pay petitioner fifty thousand dollars damages, with five per cent interest from judicial demand, and for costs, general relief, and trial by a jury.

Defendant excepted that plaintiff's petition was vague, general, and indefinite, and disclosed no just and legal cause of action, and the suit should be dismissed. The exceptions were overruled. The defendant then answered, pleading first the general issue. It denied that it was in any way liable for the injuries alleged to have been received by the husband of plaintiff, and averred that, if plaintiff's said husband ²⁴⁰ was injured as claimed in the petition, it was not through the fault and negligence of respondent, or any of its agents, servants, or employes, but, on the contrary, was entirely through the fault, negligence, and gross want of care of the plaintiff's said husband; but, in the event it should be shown there was a question of negligence, respondent pleaded that the said husband was guilty of contributory negligence.

Plaintiff, with leave of the court, filed a supplemental petition in which she alleged that she had been informed and believed, and so averred, that since the filing of her suit, the New Orleans Railways Company, a corporation doing business in this city, had acquired all the property of the New Orleans and Carrollton Railroad, Light and Power Company, and had assumed all of its liabilities, among which was petitioner's right to damages. That she reiterated and reaffirmed all the allegations of her original petition herein filed. She prayed that the New Orleans Railways Company be cited; that petitioner have judgment against it in solido with the New Orleans and Carrollton Railroad, Light and Power Company, with five per cent inter-

duties of the office, and equally eligible for appointment, unless Goodrich has a right to be preferred because of services and honorable discharge from the army of the War of the Rebellion. Goodrich was a soldier in that war and received an honorable discharge, while Mitchell never served in the army or navy at any time. With a knowledge of these facts, the mayor and council appointed Mitchell to this office, but the refusal to appoint Goodrich was not because he was lacking in qualifications, fitness, or eligibility, nor because Mitchell possessed any superior qualifications for the office. After Mitchell was appointed and had qualified, he demanded the possession of the office, and, when Goodrich declined to surrender it, Mitchell took forcible possession and ousted Goodrich therefrom.

767 It is conceded that the result of this proceeding and the right to the office in this contest depend upon the constitutionality of an act spoken of as the "veterans' preference law." It provides:

"That section 1 of chapter 160 of the Laws of 1886 be and is hereby amended so as to read as follows: In grateful recognition of the service, sacrifices and sufferings of persons who served in the army and navy of the United States in the War of the Rebellion and have been honorably discharged therefrom, they shall be preferred for appointment and employed to positions in every public department and upon all public works of the state of Kansas, and of the cities and towns of this state, over other persons of equal qualifications, and the person thus preferred shall not be disqualified from holding any position in said service on account of his age or by reason of any physical disability, provided such age or disability does not render him incompetent to perform the duties of the position applied for; and when any such ex-soldier or sailor shall apply for appointment to any such position, place or employment, the officer, board or person whose duty it is or may be to appoint a person to fill such place shall, before appointing anyone to such position, make an investigation as to the qualifications of said ex-soldier or sailor for such employment, and if he is a man of good reputation, and can perform the duties of said position so applied for by him, said officer, board or person shall appoint said ex-soldier or sailor to such position, place or employment": Laws 1901, c. 186, sec. 1; Gen. Stats. 1901, sec. 6509.

Other provisions are that a like preference shall be given if it becomes necessary to reduce the force in any of the depart-

ments, cities or towns of the state, and penalties are also declared against those who willfully refuse or neglect to obey the provisions of the act.

The fundamental infirmity in the act is not specifically pointed out. It is said to be unequal and arbitrary ⁷⁶⁸ in its operations; that the preference given to veterans necessarily restricts the privileges of others, and that it is given as reward for past services, without regard to the public service or the general welfare of the people. It is not contended that the act conflicts with any express provision of the state or federal constitutions, but, rather, that it is contrary to the implications and spirit of our constitution.

The general doctrine is that, in the absence of constitutional limitations, the legislature may prescribe how and by whom offices shall be filled. There is no contract right or property interest in an office, and hence some of the constitutional principles invoked have no application. An office is a public agency, and an officer is a mere agent of the public, entitled to exercise the functions and perform the duties of the office for the public benefit and not for his own. The main consideration in the selection of officers and agents is the public welfare, and the state, like any other principal, may select its agents; may determine for itself who can best accomplish its purpose and whose appointment will best subserve the public good. When the constitution prescribes a method or imposes a limitation, the legislature is to that extent guided and controlled in choosing its officers; but no provision has been called to our attention which prohibits the giving of a preference to veterans of the Civil War. Constitutional limitations are prescribed with respect to eligibility and the holding of office, and among them is the provision that a member of Congress, or officer of the state or of the United States, cannot hold the office of governor: Const., art. 1, sec. 10. Neither is a United States officer eligible to a seat in the legislature: Const., art. 2, sec. 5. Justices of the supreme court and judges of the district court cannot ⁷⁶⁹ hold any other office during the terms for which they are elected: Const., art. 3, sec. 13. Persons who are under guardianship, have been convicted of a felony, have defrauded the government, have given or received a bribe or offered to do so, have voluntarily borne arms against the government, with some exceptions, cannot hold office. Anyone who gives or accepts a challenge to fight a duel, or who carries a challenge to another, or who goes out of the state to fight a duel, is ineligible for office, and everyone

who has given or offered a bribe to secure his own election is disqualified from holding office during the term for which he has been elected: Const., art. 5, secs. 2, 5, 6. In the main, these are the provisions affecting the holding of office, and aside from these restrictions the whole matter is committed to the legislature by section 1 of article 15, wherein it is provided that: "All officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law."

It is conceded that the matter of holding office is a political privilege, but it is argued that it becomes a special privilege when a class of citizens are given a preference over all others. Our constitution differs materially from those of many of the states with respect to the granting of privileges. The only provision we have touching the subject is found in section 2 of the Bill of Rights, which is: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the same body; and this power shall be exercised by no other tribunal or agency."

⁷⁷⁰ In most of the states the granting of special privileges or immunities is expressly prohibited; but, as will be observed, ours seemingly contemplates that such privileges may be granted, as it provides that none shall be granted that may not be altered, revoked, or repealed. The legislature may, then, exercise its judgment and discretion in the selection of officers, unhampered by restrictions, unless some are to be implied from those expressed or from the theory of our government. As an office is a public trust, to be held and exercised for the public benefit, it is always implied, perhaps, that officers shall be chosen with a view to carrying out that purpose. So it is said that a law permitting the selection of persons unfit for the office and unable to perform its duties is defective. In *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005, 32 L. R. A. 253, it was, in effect, held that, in the absence of constitutional restrictions, the legislature had power to select officers at will, or to confer power of appointment on boards or officers; but that the appointment of a person or a class in preference to all others, without inquiry or determination whether the person appointed is actually qualified to perform the duties of the office, is inconsistent with the nature of our government. It was, therefore, held that a statute, making the appointment of vet-

erans compulsory, when the appointing power should think the applicants not qualified to perform the duties of the office sought, was invalid. If that should be accepted as the correct view, our statute is not obnoxious to such a limitation, as it only gives a preference to ex-soldiers and sailors upon the theory of equality of qualifications.

Nor is there any novelty in our legislation on the subject, as like preferences have been given by the ⁷⁷¹ legislatures of a great many states and by the Congress of the United States, and, except where the acts have been drawn so as to conflict with express constitutional provisions, they have been generally upheld. The supreme court of Massachusetts, in response to questions by the governor and council, held that the provisions of a civil service statute giving to veterans the preference for appointment to offices that they were found competent to fill, were constitutional. And the same view was expressed with reference to a provision giving a preference in public employments. It was said: "We doubt whether a statute, which purports to compel the commonwealth and its cities and towns to employ in the labor service persons who are not able to perform the labor, and to pay them wages as laborers, could be held to be either wholesome or reasonable. But if the section means that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and towns in preference to all other persons except women, if the veterans are found competent to perform the labor, we think the enactment is within the constitutional power of the general court": *In re Opinion*, 166 Mass. 589, 596, 44 N. E. 625, 34 L. R. A. 58. See, also, *In re Opinion*, 145 Mass. 587, 13 N. E. 15; *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142; *In re Sweeley*, 33 N. Y. Supp. 369; *Matter of Stutzbach v. Coler*, 168 N. Y. 416, 6 N. E. 697; *In re Wortman*, 2 N. Y. Supp. 324; *Matter of McGuire*, 57 N. Y. Sup. Ct. 203, 2 N. Y. Supp. 760; *State v. Miller*, 66 Minn. 90, 68 N. W. 732; *Townsend v. Baughner*, 55 N. J. L. 381, 26 Atl. 808; *Throop on Public Officers*, secs. 95-98; 6 Am. & Eng. Ency. of Law, 2d ed., 93.

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She alleged in her petition that the tracks were laid at the place for much narrower cars, and, since the tracks were laid, the said company had bought and operated, and did on the 29th of January, 1902, operate at that place, cars much too wide for the space between the tracks—a fact unknown to Ludwig Eichorn, and not noticeable by an ordinary observer, but which, in the interest of the public safety, and with its engineers and instruments of precision, operating electric cars through the populous streets of this city, it was bound to know and guard against, and a reasonable care for the lives of the people required it, when it adopted the wider cars, and made it the duty of the company, to increase the space between the tracks.

2. It was negligent in the selection and employment of youths, too youthful and inexperienced, and careless motoneers in the operation of its cars, which caused the death of Ludwig Eichorn.
3. On the day in question he was crossing Baronne street at the usual place, near Canal street, and his way was stopped by a car standing across the passage, and while he was standing in what appeared to be a perfectly ²³⁹ safe place, waiting for the car which obstructed his passage to go forward, another car of said defendant company, coming in the opposite direction, carelessly and negligently, and without warning of its approach, and when the motoneer ought to have waited until the other car had passed, came on, and rolled and crushed the said Ludwig Eichorn between the said two cars, when he was not then on the track of either, but between the two, where he had a right to be, and to suppose he was perfectly safe.

The motoneer ought to have been warned by the officers of the danger of rolling a car at that place alongside of one on the

separate parallel track, which had not been done, or, if done, he negligently disregarded the safety of Ludwig Eichorn. The said company could have prevented the injury, and did not do so. Ludwig Eichorn was so crushed by the said two cars that he suffered great pain in body and mind for two days, and then died. Five thousand dollars is claimed for his own sufferings, and forty-five thousand dollars for petitioner's loss of his comfort and support. He was, previous to his negligent killing by defendant, in good health, and had a life expectancy of forty years, and his earnings were about three thousand dollars a year. In view of the premises, petitioner prayed that the said New Orleans and Carrollton Railroad, Light and Power Company be cited to appear and answer, and be condemned to pay petitioner fifty thousand dollars damages, with five per cent interest from judicial demand, and for costs, general relief, and trial by a jury.

Defendant excepted that plaintiff's petition was vague, general, and indefinite, and disclosed no just and legal cause of action, and the suit should be dismissed. The exceptions were overruled. The defendant then answered, pleading first the general issue. It denied that it was in any way liable for the injuries alleged to have been received by the husband of plaintiff, and averred that, if plaintiff's said husband ²⁴⁰ was injured as claimed in the petition, it was not through the fault and negligence of respondent, or any of its agents, servants, or employes, but, on the contrary, was entirely through the fault, negligence, and gross want of care of the plaintiff's said husband; but, in the event it should be shown there was a question of negligence, respondent pleaded that the said husband was guilty of contributory negligence.

Plaintiff, with leave of the court, filed a supplemental petition in which she alleged that she had been informed and believed, and so averred, that since the filing of her suit, the New Orleans Railways Company, a corporation doing business in this city, had acquired all the property of the New Orleans and Carrollton Railroad, Light and Power Company, and had assumed all of its liabilities, among which was petitioner's right to damages. That she reiterated and reaffirmed all the allegations of her original petition herein filed. She prayed that the New Orleans Railways Company be cited; that petitioner have judgment against it in solido with the New Orleans and Carrollton Railroad, Light and Power Company, with five per cent inter-

duties of the office, and equally eligible for appointment, unless Goodrich has a right to be preferred because of services and honorable discharge from the army of the War of the Rebellion. Goodrich was a soldier in that war and received an honorable discharge, while Mitchell never served in the army or navy at any time. With a knowledge of these facts, the mayor and council appointed Mitchell to this office, but the refusal to appoint Goodrich was not because he was lacking in qualifications, fitness, or eligibility, nor because Mitchell possessed any superior qualifications for the office. After Mitchell was appointed and had qualified, he demanded the possession of the office, and, when Goodrich declined to surrender it, Mitchell took forcible possession and ousted Goodrich therefrom.

⁷⁶⁷ It is conceded that the result of this proceeding and the right to the office in this contest depend upon the constitutionality of an act spoken of as the "veterans' preference law." It provides:

"That section 1 of chapter 160 of the Laws of 1886 be and is hereby amended so as to read as follows: In grateful recognition of the service, sacrifices and sufferings of persons who served in the army and navy of the United States in the War of the Rebellion and have been honorably discharged therefrom, they shall be preferred for appointment and employed to positions in every public department and upon all public works of the state of Kansas, and of the cities and towns of this state, over other persons of equal qualifications, and the person thus preferred shall not be disqualified from holding any position in said service on account of his age or by reason of any physical disability, provided such age or disability does not render him incompetent to perform the duties of the position applied for; and when any such ex-soldier or sailor shall apply for appointment to any such position, place or employment, the officer, board or person whose duty it is or may be to appoint a person to fill such place shall, before appointing anyone to such position, make an investigation as to the qualifications of said ex-soldier or sailor for such employment, and if he is a man of good reputation, and can perform the duties of said position so applied for by him, said officer, board or person shall appoint said ex-soldier or sailor to such position, place or employment": Laws 1901, c. 186, sec. 1; Gen. Stats. 1901, sec. 6509.

Other provisions are that a like preference shall be given if necessary to reduce the force in any of the depart-

ments, cities or towns of the state, and penalties are also declared against those who willfully refuse or neglect to obey the provisions of the act.

The fundamental infirmity in the act is not specifically pointed out. It is said to be unequal and arbitrary ⁷⁶⁸ in its operations; that the preference given to veterans necessarily restricts the privileges of others, and that it is given as reward for past services, without regard to the public service or the general welfare of the people. It is not contended that the act conflicts with any express provision of the state or federal constitutions, but, rather, that it is contrary to the implications and spirit of our constitution.

The general doctrine is that, in the absence of constitutional limitations, the legislature may prescribe how and by whom offices shall be filled. There is no contract right or property interest in an office, and hence some of the constitutional principles invoked have no application. An office is a public agency, and an officer is a mere agent of the public, entitled to exercise the functions and perform the duties of the office for the public benefit and not for his own. The main consideration in the selection of officers and agents is the public welfare, and the state, like any other principal, may select its agents; may determine for itself who can best accomplish its purpose and whose appointment will best subserve the public good. When the constitution prescribes a method or imposes a limitation, the legislature is to that extent guided and controlled in choosing its officers; but no provision has been called to our attention which prohibits the giving of a preference to veterans of the Civil War. Constitutional limitations are prescribed with respect to eligibility and the holding of office, and among them is the provision that a member of Congress, or officer of the state or of the United States, cannot hold the office of governor: Const., art. 1, sec. 10. Neither is a United States officer eligible to a seat in the legislature: Const., art. 2. sec. 5. Justices of the supreme court and judges of the district court cannot ⁷⁶⁹ hold any other office during the terms for which they are elected: Const., art. 3, sec. 13. Persons who are under guardianship, have been convicted of a felony, have defrauded the government, have given or received a bribe or offered to do so, have voluntarily borne arms against the government, with some exceptions, cannot hold office. Anyone who gives or accepts a challenge to fight a duel, or who carries a challenge to another, or who goes out of the state to fight a duel, is ineligible for office, and everyone

who has given or offered a bribe to secure his own election is disqualified from holding office during the term for which he has been elected: Const., art. 5, secs. 2, 5, 6. In the main, these are the provisions affecting the holding of office, and aside from these restrictions the whole matter is committed to the legislature by section 1 of article 15, wherein it is provided that: "All officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law."

It is conceded that the matter of holding office is a political privilege, but it is argued that it becomes a special privilege when a class of citizens are given a preference over all others. Our constitution differs materially from those of many of the states with respect to the granting of privileges. The only provision we have touching the subject is found in section 2 of the Bill of Rights, which is: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the same body; and this power shall be exercised by no other tribunal or agency."

⁷⁷⁰ In most of the states the granting of special privileges or immunities is expressly prohibited; but, as will be observed, ours seemingly contemplates that such privileges may be granted, as it provides that none shall be granted that may not be altered, revoked, or repealed. The legislature may, then, exercise its judgment and discretion in the selection of officers, unhampered by restrictions, unless some are to be implied from those expressed or from the theory of our government. As an office is a public trust, to be held and exercised for the public benefit, it is always implied, perhaps, that officers shall be chosen with a view to carrying out that purpose. So it is said that a law permitting the selection of persons unfit for the office and unable to perform its duties is defective. In *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005, 32 L. R. A. 253, it was, in effect, held that, in the absence of constitutional restrictions, the legislature had power to select officers at will, or to confer power of appointment on boards or officers; but that the appointment of a person or a class in preference to all others, without inquiry or determination whether the person appointed is actually qualified to perform the duties of the office, is inconsistent with the nature of our government. It was, therefore, held that a statute, making the appointment of vet-

erans compulsory, when the appointing power should think the applicants not qualified to perform the duties of the office sought, was invalid. If that should be accepted as the correct view, our statute is not obnoxious to such a limitation, as it only gives a preference to ex-soldiers and sailors upon the theory of equality of qualifications.

Nor is there any novelty in our legislation on the subject, as like preferences have been given by the ⁷⁷¹ legislatures of a great many states and by the Congress of the United States, and, except where the acts have been drawn so as to conflict with express constitutional provisions, they have been generally upheld. The supreme court of Massachusetts, in response to questions by the governor and council, held that the provisions of a civil service statute giving to veterans the preference for appointment to offices that they were found competent to fill, were constitutional. And the same view was expressed with reference to a provision giving a preference in public employments. It was said: "We doubt whether a statute, which purports to compel the commonwealth and its cities and towns to employ in the labor service persons who are not able to perform the labor, and to pay them wages as laborers, could be held to be either wholesome or reasonable. But if the section means that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and towns in preference to all other persons except women, if the veterans are found competent to perform the labor, we think the enactment is within the constitutional power of the general court": *In re Opinion*, 166 Mass. 589, 596, 44 N. E. 625, 34 L. R. A. 58. See, also, *In re Opinion*, 145 Mass. 587, 13 N. E. 15; *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142; *In re Sweeley*, 33 N. Y. Supp. 369; *Matter of Stutzbach v. Coler*, 168 N. Y. 416, 6 N. E. 697; *In re Wortman*, 2 N. Y. Supp. 324; *Matter of McGuire*, 57 N. Y. Sup. Ct. 203, 2 N. Y. Supp. 760; *State v. Miller*, 66 Minn. 90, 68 N. W. 732; *Townsend v. Baughner*, 55 N. J. L. 381, 26 Atl. 808; *Throop on Public Officers*, secs. 95-98; 6 Am. & Eng. Ency. of Law, 2d ed., 93.

State of Iowa v. Garbroski, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. ⁷⁷² 959, 56 L. R. A. 570, is cited as an authority against the validity of a preference to veterans. That was a case where there was an attempted exemption of persons who had served in the army and navy from the payment of a license

tax. That act, which affected liabilities and imposed burdens, gave rise to a very different question than the one presented here. It was held to be a discrimination in violation of the fourteenth amendment to the federal constitution, and a denial of the equal protection of the laws. Even in that case it was remarked that "possibly a veteran soldier or sailor would be preferred, everything else being equal, for civil office, because of superior fitness, resulting from discipline of service in war; for 'it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state.' But the work of a peddler calls for no qualities such as a soldier or sailor acquires in the service." *State v. Shedroi*, 75 Vt. 277, 98 Am. St. Rep. 831, 54 Atl. 1081, involved the same question and was decided in the same way.

Office holding is a political privilege, and the matter of appointment to office is not affected by the fourteenth amendment or other provision of the federal constitution, and, as has been said, the power of the legislature is supreme in respect to appointments, save as the constitution has limited it. Already statutes have been enacted which limit the number from whom officers may be chosen, and necessarily put others who might desire these offices at a disadvantage. There are boards upon which only physicians can be appointed; others to which only dentists are eligible; others where architects or skilled mechanics have the preference; others where a woman is arbitrarily ⁷⁷³ appointed; and still others where political opinions enter into the qualifications of members—that is, enactments that members of boards shall be taken in certain proportions from different political parties. These acts are generally held to be within the legislative power, and the preferences and the exclusions so made to be reasonable and valid. Where the limitation from which officers shall be chosen is manifestly for the public good, and where the purposes sought and the ends attained in legislation in regard to the qualifications for office are the safety and welfare of the public, it cannot be said that the rights of any others are unduly affected or prejudiced.

If we should lay aside the gratitude, mentioned in the first part of the section in question, for those who sacrificed and suffered in defense of the nation, there are reasonable and substantial considerations for making a preference in favor of the love of country that induced them to fight for its defense its institutions is some assurance, at least,

of loyalty and fidelity in the civil service. In the nature of things, the discipline of the army and navy tended to promote promptness, respect for authority and obedience to law, courage to meet difficulties and overcome selfish and sinister influences, steadiness of purpose, perseverance, and devotion to duty. These considerations may very well have appealed to the discretion and judgment of the legislature in determining who could render the best service to the public, and we see no reason why they are not reasonable and sufficient. In the civil service laws of the country, conceded to be beneficial and valid, a preference is given because of the former experience in the public service, and why should not the public service of those who imperiled their lives in the defense of their country ⁷⁷⁴ receive like recognition and preference? As counsel for the plaintiff has well said: "A grateful recognition of the service, sufferings and sacrifices of persons who have served the state in war has always been recognized by all nations as the exercise of the highest public policy, as the surest guaranty of the future safety, honor and welfare of the state."

In *Keim v. United States*, 177 U. S. 290, 20 Sup. Ct. Rep. 574, 44 L. ed. 774, the preference law enacted by Congress was considered and interpreted, but its constitutionality seems to have been conceded, as no attack was made upon its validity. Judge Brewer, in deciding it, remarked that, "No thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army or navy." That such service afforded reasonable grounds for preference in public offices and employments was recognized in *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005, 32 L. R. A. 253, where it was remarked:

"It may be said that, other qualifications being equal, there are reasons to believe that a veteran soldier or sailor often will make a better civil officer than a person who never has been subjected to the discipline of service in war, and it is distinctly a public purpose to promote patriotism and to make conspicuous and honorable any exhibition of courage, constancy and devotion to the welfare of the state shown in the public service. These things we assume the legislature may take into account in providing for appointments to office where the qualifications are not prescribed by the constitution."

The court, in *Re Opinion*, 166 Mass. 589, 596, 44 N. E. 625, 34 L. R. A. 58, in speaking of the belief that faithful service in and honorable discharge from the War of the Rebu

lion developed such qualifications of character in men that it was to the ⁷⁷⁵ interest of the commonwealth to appoint them to office in preference to others, said:

"The general court may have so thought, on the ground either that such a person would be likely to possess courage, constancy, habits of obedience, and fidelity, which are valuable qualifications for any public office or employment, or that the recognition of the services of veterans in the way provided for by the statute would promote that love of country and devotion to the welfare of the state, which it concerns the commonwealth to foster. If such was the opinion of the general court, we cannot say that it was beyond its constitutional power to enact this section. Of the wisdom of such legislation we are not made the judges."

Faithful service and devotion to duty in the past have always been regarded as good consideration for preference or promotion in every department in life, public and private, and it belonged to the legislature to determine what qualifications and experience give the best assurance of faithful, honest and efficient public service. The case is quite unlike the one supposed, of a right to office by those affiliated with a particular church or a particular party, or because of some private achievement. The preference that is made here has its basis on services to the public and experience and fidelity in the public service, and we think it was within the constitutional power of the legislature to make such a preference.

It is conceded that the plaintiff possessed every qualification, and was entitled to reappointment as against the defendant, who was the only other applicant for the position. The mayor and council were, therefore, required to give the plaintiff the preference, and under the circumstances had no power or authority to appoint the defendant. The plaintiff, being in the office, was entitled to continue until some one was legally appointed, ⁷⁷⁶ and, therefore, had a right to bring a proceeding in quo warranto to obtain the possession of the office.

Judgment will therefore be given in favor of the plaintiff.

All the justices concurring.

The Decision in the Principal Case seems opposed to *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357; *State v. Gabroski*, 111 Iowa, 496, 82 Am. St. Rep. 524; *State v. Shedroi*, 75 Vt. 277, 98 Am. St. Rep. 825.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

**EICHORN v. NEW ORLEANS AND CARROLLTON RAIL-
ROAD, LIGHT AND POWER COMPANY.**

[118 La. 236, 36 South. 335.]

RAILROADS—Negligence—Measure of Care.—If a railroad company, in the management of its business, causes unusual peril to travelers, it must meet such peril with unusual precautions, and failing in this is guilty of negligence. (p. 442.)

RAILROADS—Negligence—Dangerous Crossings.—If a railroad crossing is especially dangerous to travelers, on account of its locality or mode of construction, or because the track is curved or the view obstructed, the railroad company must exercise such care and take such precautions as the dangerous nature of the crossing requires, and failing in this, is guilty of negligence. (p. 442.)

RAILROADS—Negligence—Regulations at Crossings.—In the absence of regulations imposed by statute or ordinance seeking to meet existing conditions at dangerous railroad crossings, the railroad company must make and enforce such regulations for the safety of travelers, and failing in this is guilty of negligence, and must abide the consequences. (p. 443.)

RAILROADS—Negligence of Trainmen—Dangerous Crossings. If trainmen have reason to believe that there are persons in exposed positions on the railroad track, as over unguarded crossings in populous districts in a city, or where the public are wont to cross on the track with such frequency and numbers as to be known to those in charge of the train, they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, and render the railroad company liable for injuries therefrom, although there was negligence on the part of the injured, and no fault on the part of the trainmen after seeing the danger. (p. 443.)

RAILROADS—Negligence—Traveler on Space Between Tracks. The general public is not called upon to know or observe at a glance that the space between parallel railroad tracks in a city is not wide enough to afford protection to a person standing on such space, or to know the length and width of the cars upon the tracks, and such person has a right to assume that such space is sufficient and that i

is not likely that two moving cars will pass each other while he is in that position, but that one of them will stop before reaching him. (p. 446.)

Dart & Kernan, for the appellant.

G. J. Untereiner and B. R. Forman, for the appellee.

²²⁸ NICHOLLS, C. J. The plaintiff, as widow of Ludwig Eichorn, seeks in this action to recover from the defendant the sum of fifty thousand dollars, with legal interest, because, as she alleged, through its negligence, unskillfulness, and want of care in laying its tracks on Baronne near Canal street, and operating its cars at said place on the 29th of January, 1902, it killed her husband, who was lawfully upon the public streets at that place, and without fault or negligence on his part.

She alleged in her petition that the tracks were laid at the place for much narrower cars, and, since the tracks were laid, the said company had bought and operated, and did on the 29th of January, 1902, operate at that place, cars much too wide for the space between the tracks—a fact unknown to Ludwig Eichorn, and not noticeable by an ordinary observer, but which, in the interest of the public safety, and with its engineers and instruments of precision, operating electric cars through the populous streets of this city, it was bound to know and guard against, and a reasonable care for the lives of the people required it, when it adopted the wider cars, and made it the duty of the company, to increase the space between the tracks.

2. It was negligent in the selection and employment of youths, too youthful and inexperienced, and careless motoneers in the operation of its cars, which caused the death of Ludwig Eichorn.
3. On the day in question he was crossing Baronne street at the usual place, near Canal street, and his way was stopped by a car standing across the passage, and while he was standing in what appeared to be a perfectly ²²⁹ safe place, waiting for the car which obstructed his passage to go forward, another car of said defendant company, coming in the opposite direction, carelessly and negligently, and without warning of its approach, and when the motoneer ought to have waited until the other car had passed, came on, and rolled and crushed the said Ludwig Eichorn between the said two cars, when he was not then on the track of either, but between the two, where he had a right to be, and to suppose he was perfectly safe.

The motoneer ought to have been warned by the officers of the danger of rolling a car at that place alongside of one on the

separate parallel track, which had not been done, or, if done, he negligently disregarded the safety of Ludwig Eichorn. The said company could have prevented the injury, and did not do so. Ludwig Eichorn was so crushed by the said two cars that he suffered great pain in body and mind for two days, and then died. Five thousand dollars is claimed for his own sufferings, and forty-five thousand dollars for petitioner's loss of his comfort and support. He was, previous to his negligent killing by defendant, in good health, and had a life expectancy of forty years, and his earnings were about three thousand dollars a year. In view of the premises, petitioner prayed that the said New Orleans and Carrollton Railroad, Light and Power Company be cited to appear and answer, and be condemned to pay petitioner fifty thousand dollars damages, with five per cent interest from judicial demand, and for costs, general relief, and trial by a jury.

Defendant excepted that plaintiff's petition was vague, general, and indefinite, and disclosed no just and legal cause of action, and the suit should be dismissed. The exceptions were overruled. The defendant then answered, pleading first the general issue. It denied that it was in any way liable for the injuries alleged to have been received by the husband of plaintiff, and averred that, if plaintiff's said husband ²⁴⁰ was injured as claimed in the petition, it was not through the fault and negligence of respondent, or any of its agents, servants, or employes, but, on the contrary, was entirely through the fault, negligence, and gross want of care of the plaintiff's said husband; but, in the event it should be shown there was a question of negligence, respondent pleaded that the said husband was guilty of contributory negligence.

Plaintiff, with leave of the court, filed a supplemental petition in which she alleged that she had been informed and believed, and so averred, that since the filing of her suit, the New Orleans Railways Company, a corporation doing business in this city, had acquired all the property of the New Orleans and Carrollton Railroad, Light and Power Company, and had assumed all of its liabilities, among which was petitioner's right to damages. That she reiterated and reaffirmed all the allegations of her original petition herein filed. She prayed that the New Orleans Railways Company be cited; that petitioner have judgment against it in solido with the New Orleans and Carrollton Railroad, Light and Power Company, with five per cent in

est per annum from judicial demand, and costs, and for general relief.

The court ordered the New Orleans Railways Company to be made a party defendant and cited. The case was tried before a jury, which returned a verdict for plaintiff in the sum of twenty-five thousand dollars, with legal interest from judicial demand. Defendant unsuccessfully applied for a new trial. The court rendered judgment upon the verdict and in favor of the plaintiff against the New Orleans and Carrollton Railroad, Light and Power Company for the sum of twenty-five thousand dollars, with legal interest from judicial demand, and defendant appealed.

²⁴¹ In 110 La. 534, 34 South. 667, will be found reported the case of *Schwartz v. New Orleans etc. R. R. Co.*—an action sounding in damages against the defendant in that case for injuries received by the plaintiff by being caught and crushed between two cars which were being operated by the defendant company on Baronne street, in New Orleans, near its intersection with Canal, the cars moving in opposite directions on distinct tracks. The facts of the case are fully set out, and a diagram showing the situation of the railroad tracks at and near the spot where the injury was received will be found annexed to the opinion of the court. The injury to Ludwig Eichhorn which resulted in his death, and which gave rise to the present litigation, was received by him at the same place, and under very similar circumstances. The defendant company operates electric cars from a point on Canal street near the Mississippi river to Baronne, and thence up Baronne street to the upper part of the city. The company has double tracks on the neutral ground on Canal street and also double tracks on Baronne street. The connection of the tracks upon these two streets is made by curved tracks crossing Canal street at Baronne. One of the company's tracks on Canal is on the upper or right-hand side of the neutral ground as one faces the Mississippi river, and the other on the lower side of the neutral ground. The cars conveying passengers from the upper part of the city pass down upon the right-hand track on Baronne street, cross Canal street on a sharp curve to the upper side of the neutral ground on Canal, and pass on to the end of the line, near the river. At that point they cross to the track on the lower side of the neutral ground, and pass toward the rear of upon that track, until they reach Baronne. They then al street upon a wide curve to the intersection of Ba-

ronne and Canal streets, and proceed to the upper part of the city on the ²⁴² track opposite to that on which they had gone down.

The curved tracks by which the tracks on Baronne street connect with those on Canal street being upon the crossing at the intersection of these two streets, upon which pedestrians cross from one side of Baronne street to the other. Baronne at that point is one of the busiest streets in the city. Hundreds of persons, if not thousands, cross there each day, and the street there is frequently blocked by vehicles. The tracks on Baronne street, even when they are parallel to each other, are too close together to enable a person to stand safely upon the space between the two, and, should a person be standing at the point where the curves upon the crossing commence at the time when two moving cars pass each other there, he would meet with almost certain death, as, in passing, the ends of the moving cars swing toward each other, and block the way up upon the upper side.

The tracks, when they were laid, were, even with the cars then in use, traps, to all persons not having knowledge of the exact situation; and the danger had been made much greater for several years past than it was before, as wider and longer cars have been substituted for those formerly used.

A street railway company accepting a franchise to operate cars upon tracks so dangerously laid at points very menacing to human life was bound to know of the risks it was assuming, and the duties and burdens it was taking upon itself. It is no answer for it to say that it could not control the city officers and authorities in its placing of the tracks. There was no obligation on its part to engage in the business at all, and, if it thought proper so to do, in view of and in spite of the attendant responsibilities, it could not avoid the legal consequences of a failure on its part to meet the requirements resulting from the exact situation. Not only was the company itself held to a knowledge ²⁴³ of the dangerous situation of affairs, but the conductors and the motormen upon the cars were also bound to know this. It required no notice to them from the officers of the company of this fact, for this matter was constantly and directly before their eyes. The danger of the situation in respect to this crossing had been additionally demonstrated and brought home to the company by the accident to Schwartz. In the Schwartz case this court quoted approvingly from Elliott on Roads and Streets, second edition, pages 856, 791, to the follo

ing effect: "If a railroad company, in the management of its traffic, causes unusual peril to travelers, it should meet such peril by corresponding precautions. So, where the crossing is especially dangerous to travelers, on account of its locality or mode of construction, or because the track is curved or the view obstructed, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires."

Proceeding, this court said: "The danger [in that case] might have been avoided, without material impairment of the sufficiency of the car service, by simply not permitting the cars to meet on the crossing, and it was incumbent upon the defendant to do so. See, in this connection, *Summers v. Railroad*, 34 La. Ann. 145, 44 Am. Rep. 419. That there is danger to the public in permitting the cars to meet at this crossing, the present case and another one before the court but too sufficiently attest. Defendant should have known of this danger, and guarded against it. He who creates a danger upon or near a public highway must see to it that no harm results therefrom to the public": Wharton on Negligence, 839; Thompson on Negligence, 346.

Notwithstanding this positive announcement by the court as to what was legally required of railroad corporations for the protection of the public at this very crossing,²⁴⁴ no steps whatever seem to have been taken toward the performance of defendant's plain duty in the premises. No instructions were given to its subordinates on the subject, and they were left free to follow their own ideas as to what was proper or necessary to be done.

If the defendant company was of the opinion that its duties to the public went no further than compliance with positive existing statutes or ordinances, it was mistaken. In *Lampkin v. McCormick*, 105 La. 422, 83 Am. St. Rep. 245, 29 South. 952, we said: "It may be that these obligations were not imposed by general ordinances or statutes, but there are certain obligations imposed upon railroad corporations independently of convention or ordinance or statute. There is a duty imposed upon everyone, whether natural persons or artificial persons, to avoid, by proper care, doing injury to others through their fault." *Sundmaker v. Yazoo etc. R. R.*, 106 La. 116, 30 South. 100. The court declared that, if the city council failed to pass a regulation called for by existing conditions, "the company, of its own motion, made a regulation to that effect;

that it was in fault in not having done so, and must abide the consequences."

It is error to suppose that trainmen operating cars have no duties to perform, other than those as to which they have received specific directions. They are required to do whatever the necessities of a particular situation or condition legally demands, whether they have received instructions or not; and, as said in *Downing v. Morgan's La. Ry. Co.*, 104 La. 519, 29 South. 207, "the precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury increases, and their sufficiency is to be gauged by what is called for by the special circumstances of each case."

In *Ortolano v. Morgan's La. R. R. Co.*, 109 ²⁴⁵ La. 911, 33 South. 917, this court said: "Where trainmen have reason to believe that there are persons in exposed positions on the track, as over unguarded crossings in populous districts in a city, or where the public are wont to cross on the track with such frequency and numbers as to be known to those in charge of the trains, they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, and render their employes responsible for injuries therefrom, notwithstanding there was negligence on the part of the injured, and no fault on the part of the servant after seeing the danger."

We now pass to the facts of the case, and premise by saying that, at the point at which he was standing when injured, Eichorn was neither a trespasser nor a licensee. He was in the public streets of the city, and had a legal right to be where he was: *Lampkin v. McCormick*, 105 La. 422, 83 Am. St. Rep. 245, 29 South. 952. On the morning of the 29th of January, 1902, Eichorn started to cross from the wood side to the river side of Baronne street at its intersection with Canal street. He started across the street almost at the same moment that one Geoghehan did so, Eichorn being upon the latter's right. At that moment there was a car, which we will refer to as the "outgoing car," upon the river-side track of Baronne street. It was then either at rest, discharging its passengers, with its front immediately above the foot crossing of Baronne street, or it was just starting or had just started to move out onto Canal on its way to the river. At this same time a car of the same company, which will be referred to as the "incoming car," was crossing Canal street on its way uptown through Baron street. Geoghehan and Eichorn both passed in front of 1

latter car without injury. The incoming car did not stop in consequence of their crossing in front of it. According to the motorman's own account, he only checked up, and at ²⁴⁶ once put the power on again. It is true that it was soon after this brought to a standstill, but only after Eichorn had received his injury. Geoghehan and Eichorn, upon reaching the space intervening between the two tracks, found that they would be unable to cross over the second track, for the reason that the outgoing car had already started down the track, and was so close upon them as to have made it dangerous to pass in front of it. Both, therefore, stopped. In the meantime the incoming car, moving up, passed to the rear of the two men. After the two cars passed each other, the front end of the incoming car and the rear end of the outgoing car swung across the space between the two tracks, closing it up so closely that the only exit which could be made at that time from parties between the two cars was by moving rapidly towards Canal street. The space between the cars, widened as the curves extended into Canal street. Geoghehan, being on the left of Eichorn, and the nearer to Canal street, occupied a position where the interval between the tracks was wider than was the space in which Eichorn found himself.

Believing the space between the tracks sufficiently wide for safety, Geoghehan remained standing where he was, and escaped injury. In his testimony, he says that he was not squeezed, but it was very close. Eichorn, being to his right, on a narrower space, was rolled along between the cars, and his ribs crushed in to such an extent that in two days he died.

We have before us a model representing the condition of things at the place where the accident occurred, corresponding to the diagram which is attached to the opinion of this court in the Schwartz case. Very considerable testimony was adduced to show upon the model the precise spot at which Eichorn was standing when the cars passed him, but we do not consider the fixing of that precise spot, under the circumstances ²⁴⁷ of this case, to be as important as defendant's counsel think it was, for Eichorn had the legal right to have been either at the point

the plaintiff claims he was, or at that point at which de- seeks to place him; and, as matters shaped themselves, ry was as certain to occur to him at one place as the The two cars had no more right to throw him between he space between the tracks by moving past each other but than at the other: Downing v. Morgan's La. R. R.

The direct, immediate cause of the injury to plaintiff's husband was the fact of the two cars of the defendant company moving simultaneously—one before and the other behind him—while he was standing in the very narrow space between the two tracks. The cars unquestionably met and passed each other on the foot crossing. This could not have been done without culpable negligence. The outgoing car was brought to a standstill after Eichorn got between the two cars by the emergency signal given by its conductor, and the other car was brought to a halt by the action of its motorman himself. The latter says he saw Eichorn "pass" his dashboard, and soon after, hearing him moan, he looked out, and saw him at the side of his car, and between the two cars. Unquestionably Eichorn disappeared from opposite the dashboard of the incoming car, but this was not because he moved to the left, but because that car, moving forward, passed up to and beyond him. Not a witness testified that either Geoghehan or Eichorn, prior to the accident, shifted their respective positions between the tracks from what they had been originally.

The two cars could not have occupied the positions which they did, relatively to each other and to Eichorn, on the space between the two tracks at or near the foot crossing, without fault on the part of defendant's employes. That condition of affairs cannot be ³⁴⁸ explained away. Having reached the conclusions we have as to there being fault on the part of the defendant company, we have to inquire whether there exists any fact which it can set up which would relieve it from liability therefor. Defendant urges contributory negligence on the part of Eichorn, but we have failed to find any act of his which could be chargeable with being negligent. That question was thoroughly discussed in the Schwartz case, and the same reasons which absolved Schwartz from the charge of negligence absolve Eichorn. He was clearly not chargeable with negligence in passing into the open space between the two tracks before the incoming car, for he passed across in safety, and negligence, so far as that act is concerned, does not enter as a cause of injury at all as a factor in the consideration of the case: *De Mahy v. Morgan's La. R. R.*, 45 La. Ann. 1342, 14 South. 61; *Schwartz v. New Orleans etc. R. R. Co.*, 110 La. 619, 34 South. 709. Being once upon the open space between the tracks, he could not have acted in any other manner than he did. He was perfectly passive, and the accident to him resulted by the two cars moving negligently, one in front of and the other behind him, '

that he could not have possibly escaped. Geoghehan barred the way to the left, and the space to the right was closed.

As one of the general public, he was not called upon to know or to take in at a glance that the space between the two tracks was not wide enough to afford protection to a person standing upon it, or to know the length and the width of the cars used upon the road; and, if he had known that the position was dangerous, he had the right to assume that the company's employees did also know, and one or other of the cars would stop before reaching him.

We now pass to the quantum of damages. Eichorn had five ribs broken and crushed into his lung. He died in two days. Defendant says that during that period he was ²⁴⁹ insensible. If there be testimony to that effect, it has escaped us. His wife testified he groaned constantly and suffered greatly. He earned from two hundred dollars to two hundred and fifty dollars a month. He was thirty-nine years of age and in good health, and his expectancy of life was about twenty-eight years.

He left seven children, all minors. Plaintiff insists that the amount of the verdict was far too small an amount, and, by answer to the appeal, prays for an increase in the amount. The present suit is brought on behalf of the widow. Defendant's counsel inform us that a second suit, claiming damages for a like amount, has been brought on behalf of the children.

No objection or exception was made to this course. We think it proper to say we do not think the lawmakers intended that there should be distinct suits before different juries, but that all the issues involved should be presented and disposed of at one and the same time.

We think the judgment in favor of the plaintiff on the merits is correct, but that the amount of damages allowed is too large, and that it should be reduced to ten thousand dollars.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount awarded to the plaintiff to ten thousand dollars, and, as amended, it be affirmed, appellee to pay the costs of appeal.

It is the Duty of a Railroad Company to so construct and maintain its crossings that they may be safely used by persons traveling the highway; and for a negligent breach of this duty it must answer in damages to one injured thereby while exercising ordinary care: Terre Haute R. Co. v. Clem, 123 Ind. 15, 18 Am. St. Rep. 301.

On the duty of a Railroad Company to persons occupying open spaces between tracks, see Lampkin v. McCormick, 105 La. Ann.

418, 83 Am. St. Rep. 245; *Reidel v. Philadelphia etc. R. R. Co.*, 87 Md. 153, 67 Am. St. Rep. 328; on its liability to a person on a walk alongside the track, or in the street, who is struck by projecting brakes, or timbers, see *Sullivan v. Vicksburg etc. R. R. Co.*, 39 La. Ann. 800, 4 Am. St. Rep. 239; *Chicago etc. R. R. Co. v. Reilly*, 212 Ill. 506, 103 Am. St. Rep. 243; on its liability to a passenger on a train who is struck by a structure built too near the track, or by a car standing on a switch, see *Kird v. New Orleans etc. Ry. Co.*, 109 La. 525, 94 Am. St. Rep. 452; *Clerc v. Morgan's etc. Steamship Co.*, 107 La. 370, 90 Am. St. Rep. 319; and on its liability to employes on a train injured by structures and natural objects near the track, see *Pittsburgh etc. Ry. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120; *Whipple v. New York etc. R. R. Co.*, 19 R. I. 587, 61 Am. St. Rep. 796; *Georgia Pac. etc. Ry. Co. v. Davis*, 92 Ala. 300, 25 Am. St. Rep. 47.

STATE v. COOPER.

[112 La. 281, 36 South. 350.]

MURDER—Evidence in Mitigation.—Evidence that the daughter of the defendant, about thirty minutes before the homicide, informed him that two days previously the deceased had gone to her house and had committed a rape upon her, and that that was the first time that she had met her father since the outrage is admissible, not for the purpose of justifying or excusing the homicide, but for the purpose of showing such provocation as would reduce the killing from murder to manslaughter, as having been done in hot blood and the heat of passion. (p. 451.)

MURDER—"Cooling Time."—In homicide cases the question of reasonable "cooling time" on the part of the defendant is one of fact for the jury to determine, and not one to be decided by the court. (p. 451.)

P. B. Carter, S. D. Corkern, L. L. Morgan, A. N. Simmons, W. Doyle and J. E. Generelly, for the appellant.

W. Guion, attorney general, G. W. Goodbee, district attorney, B. M. Miller and L. Guion, for the state.

²⁸² **NICHOLLS, C. J.** Defendant was indicted for the murder of one William Jones. On the trial of his case, the jury returned against him a verdict of guilty as charged, without capital punishment. He was sentenced to imprisonment at hard labor in the state penitentiary for life. He appealed.

We find a number of bills of exception in the record, but counsel rely for a reversal upon the complaint set out in the fifth and eighth bills of exception.

The fifth bill recites that the defendant offered himself to prove that on the night of the homicide, about twenty minutes before it, he was told by his daughter that the deceased had committed an outrage on her person the previous Sunday evening, two days before the homicide, and that this was the first time he had ever seen his daughter after the outrage complained of; to the admission of which statement in evidence, counsel for the state objected as immaterial, incompetent, and irrelevant, and not justifying or excusing the homicide. One Eugene Williams, the only eye-witness, had testified that he and the deceased and defendant were riding home from the primary election held Tuesday, October 20, 1903, at about 8 o'clock at night; that when about a quarter of a mile from the precinct the defendant, Cooper, rode ahead of the other parties, and in a short time—about thirty minutes—he returned, and met the deceased and state witness Williams, and Cooper then had a gun, which he did not have when he left them, and that he presented his gun at deceased, and said, "You have done me enough," and deceased said, "What have I done to you, Mr. Cooper?" that defendant said, "You have done me a plenty, and I would as soon kill you and go to hell as not." Deceased then said, "You have the advantage of me, Mr. Cooper. Give me a show for my life." The defendant then fired, and the deceased fell ²⁸³ from his horse. The witness' horse ran away with him, and defendant rode off. The deceased was found by the witness at the spot where he was shot, with his brains shot out. Under this testimony the district judge sustained the objection, assigning as his reason that such testimony did not justify or excuse the homicide.

The eighth bill recites that, on the trial, counsel offered the daughter of the accused as a witness, and, being asked by the district attorney the object and purpose of her testimony, stated that "he intended to prove and could prove by her that she was the daughter of the accused; that on a Sunday evening preceding the homicide the deceased, Willie Jones, came to her house and committed a rape upon her person by force and violence; that the first opportunity she had of informing her father, the accused, of the occurrence, was on Tuesday night, the night of the homicide some fifteen or twenty minutes before the killing, at her house, near the place of the killing, when she did inform her father; that he immediately left the house, and shortly afterward returned and informed her he had killed the deceased; that, on objection made by the district attorney to allowing her testimony on the same grounds as had been assigned

by him to the admission of her father's testimony, the court sustained the objections, assigning as his reason that such testimony did not justify or excuse the homicide."

In the brief of counsel for the accused, they say: "The evidence was not admissible for the purpose of justifying or excusing the homicide, but they submitted that it was admissible for the purpose of showing such provocation as would reduce the killing from murder to manslaughter." Counsel for the defendant contend that the court should have permitted the evidence to be introduced, subject to subsequent instructions from the ²⁸⁴ court; that it should be left to the decision of the jury whether, under the circumstances shown, accused had not acted in such heat of blood and passion as might, in their opinion, justify a verdict of manslaughter; that the court should not have withdrawn that question, on that evidence, from the jury, by passing upon it itself. Counsel further urged that the rule that an intentional killing may be only manslaughter (what is termed "voluntary manslaughter") is so well established and so universally recognized that it would be superfluous to cite authorities. They say: "Where the killing is intentional, deliberate, premeditated, and with malice aforethought, the offense is murder; but where the killing is intentional, but without premeditation or malice, but done in the heat of passion, upon sufficient, adequate provocation, the offense is only manslaughter, and that this is true even if done with some deliberation, if without premeditation or malignity of heart, but imputable to human infirmity: *State v. Holme*, 54 Mo. 166; *State v. Ellis*, 74 Mo. 207, 222." They cite 2 Bishop's New Criminal Law, sec. 697 et seq.; Stephens' Digest Criminal Law, art. 225; *State v. Hill*, 4 Dev. & B. 491, 34 Am. Dec. 396; 1 McLain's Criminal Law, secs. 337, 342; 3 Greenleaf on Evidence, 13th ed., sec. 122; 1 Wharton's Criminal Law, secs. 455, 460; *State v. Boitreaux*, 31 La. Ann. 188; *State v. Concienne*, 50 La. Ann. 848, 24 South. 134; *Walcott v. Brander*, 10 Tex. 421; *Dikes v. Monroe*, 15 Tex. 236, 617; *Cooper v. Singleton*, 19 Tex. 266, 70 Am. Dec. 333; *Hawley v. Bullock*, 29 Tex. 223; *Dawson v. State*, 33 Tex. 492; *Stokes v. State*, 18 Ga. 17; *Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630; *Murphy v. State*, 31 Ind. 511; *Cheek v. State*, 35 Ind. 492; *State v. Adams*, 78 Iowa, 292, 43 N. W. 194; *Smith v. State*, 83 Ala. 26, 3 South. 551; *Campbell v. Commonwealth*, 88 Ky. 402, 21 Am. St. Rep. 348, 11 S. W. 290. They quote Bishop as saying that "it was too strong to say that the reason of the party ²⁸⁵ should be dethroned, or he should act in a whirlwind of pas-

sion," and Wharton as declaring that, "when there is a legal duty to protect, then an assault on the chastity of a ward [using the term in its largest sense] will be a sufficient provocation to make hot blood thus caused an element which will reduce the grade of the crime to manslaughter. . . . There is no sound reason why a similar allowance should not be made for a father's or brother's indignation at a sexual outrage on a daughter or sister. To impose a severer rule would be a departure from the analogies of the law, and would bring the court in conflict not only with the jury, who, under such circumstances, would never convict of murder, but with the common sense of the community. Supposing the injury to female chastity be avenged in hot blood by a brother, a father, or other person having a right to protect the person injured; the offense is but manslaughter." Counsel quote very strong expressions on this subject used by Chief Justice Lumpkin in *Bigg v. State*, 29 Ga. 723, 76 Am. Dec. 630. Counsel call our especial attention to the Texas and Indiana cases, as holding that the facts must be reviewed from the standpoint of defendant, and that, if the adequate cause and passion existed in the mind of the accused, his offense would be of no higher grade than manslaughter, although such insulting conduct had never occurred, provided he believed it had, and that the charge of the court should be so framed as to submit this important issue to the jury. The district judge did not in the present instance set out the precise grounds upon which he acted, but we imagine he did not exclude the evidence for the reason that he differed in opinion from the commentators quoted, that a homicide committed by a father in hot blood, because of a sexual outrage upon his daughter, would reduce his crime from murder to manslaughter, but because he was of the opinion that too long a period had elapsed between the time when ²²⁸ the accused became informed of the outrage and the subsequent killing to have warranted the jury legally in holding that the homicide was committed in the heat of passion.

The question we have to decide is whether the judge erred in excluding the evidence, instead of allowing it to be introduced and passed upon by the jury in connection with the balance of the evidence which may have been admitted on the trial under proper instructions from the court. We ourselves have ~~no knowledge~~ of what that evidence was, nor what instructions ~~given to the jury~~. We infer from the fact of the ~~many~~ of the daughter that no testimony of a sexual outrage upon her was sent to the

jury. We are not of the opinion that testimony as to the same was irrelevant, immaterial and incompetent—on the contrary, that evidence might disclose facts all-important for a proper decision of the case. The accused was before the jury charged under the indictment with murder. It was authorized, under such an indictment, if the facts justified, to return a verdict of manslaughter. The accused was entitled to present his defense before it in a way which might exclude an unqualified verdict of murder, or one of guilty without capital punishment. The question of reasonable cooling time is a question of fact to be determined by the jury, and not one to be decided by the court: *Rex v. Heyward*, 6 Car. & P. 1; *Rex v. Lynch*, 5 Car. & P. 324; *Wharton's American Criminal Law*, 4th ed., sec. 900; 1 *Russell on Crimes*; *Rice on Criminal Evidence*, sec. 369, p. 592.

This is particularly the case in Louisiana, where the juries are judges both of the law and facts. We think the rejected testimony should have been admitted, subject to instructions from the court.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the verdict of the jury be set aside, and the judgment rendered thereon be annulled, avoided²⁸⁷ and reversed; that the cause be reinstated; and it is hereby remanded to the lower court for further proceedings according to law.

Breaux, J., concurs in the decree.

As to Whether a Homicide may be reduced to manslaughter by the fact that the deceased had outraged the daughter of the accused, see *State v. Grugin*, 147 Mo. 39, 71 Am. St. Rep. 553. The killing of adulterers is discussed in the monographic note to *State v. Yanz*, 92 Am. St. Rep. 214-220.

What is a Sufficient Cooling Time, as these words are used in the law of homicide, is usually a question of fact for the jury: *Maheer v. People*, 10 Mich. 212, 81 Am. Dec. 781; *State v. Grugin*, 147 Mo. 39, 71 Am. St. Rep. 553.

SCHOULTZ v. ECKARDT MANUFACTURING CO.

[112 La. 568, 36 South. 593.]

MASTER AND SERVANT—Negligence—Proximate Cause.—If machinery breaks and a workman, in attempting to repair it, is injured, the causes which brought about the break are remote and not the proximate cause of the injury. (p. 454.)

MASTER AND SERVANT—Dangerous Machinery.—A master is under no obligation to provide a guard for inner and ordinarily inaccessible parts of machinery, with which no one can come in contact except by imprudent conduct. (p. 454.)

MASTER AND SERVANT—Contributory Negligence of Servant.—If there are two ways of doing a thing, one safe and the other unsafe, and the servant knows it, or ought to know it, and he chooses the unsafe, and is injured, he cannot recover against the master for the injury. (p. 455.)

MASTER AND SERVANT—Contributory Negligence of Servant.—A master is not bound to keep his premises so lighted that any and all repair work may be done without the necessity of procuring extra light. If such light is needed, a servant who undertakes to repair without procuring it and is injured, cannot recover against the master. (p. 455.)

Fenner, Henderson & Fenner and Chapins & Holt, for the appellant.

Story & Pugh, for the appellee.

509 PROVOSTY, J. Plaintiff was an experienced workman, of fifteen years' standing. He was molder and planer foreman, and in that capacity had charge of the workmen, machinery, etc., on one of the floors of defendant's sash and door factory. He states that his further duty was "to fix belts and keep the machines in running order." He had been in defendant's employ some fourteen months, discharging those duties, when he was called upon to mend one of the belts of one of the saw tables, and had four of his fingers cut off in attempting to do the work. As soon as his hand got well, he went back to his same work in defendant's mill, at the same wages, and worked for some time, until he quit of his own accord. During this time he acknowledged that he himself was to blame for the accident. He denies that he made such admission, but three witnesses testify to it. Afterward he changed his mind and brought this suit, eleven months after the accident.

The saw table in question is five feet long, three feet wide, and three feet six inches high. It is a substantial structure,

the framework underneath consisting of three thick uprights on each side, braced at top and bottom by thick crosspieces, both on the sides and on the ends. The saw—a circular saw, fourteen inches in diameter—is under the table, the blade protruding through a longitudinal slit in the middle of the table. The belt to be mended is under the table, to one side, and near one of the ends. It could be reached for mending, without any danger from the saw, from that side of the table on which it was, and from either end of the table. Plaintiff chose the other side of the table, from which he could not reach the belt without stretching his arms across the line of the saw. He got down on his knees, and put his head and arms into the framework of the table. The saw was then above him, to his right. What he did while in this position, and what happened, we will let him describe himself: "I ⁵⁷⁰ got hold of the belt and commenced to lace it, and I was pulling on it, when the lacing string got caught in some way, and I could not pull it very easily. So I took a good hold of it, and I wrapped it round my hand or fingers as a man usually does when he wants to pull hard, and I pulled with all my might with my hand, holding it down with the other; and when I pulled so hard the lacing string broke, and it broke with such force that my hand flew up and struck against the saw, that was running, and it took my fingers off."

The negligence charged against defendant is alleged to have consisted in—1. That the saw was running at an excessive rate of speed; 2. That it was not properly hooded or guarded; 3. That the machine was not geared with a countershaft, so that it could be stopped without stopping the entire machinery of the mill; 4. That the place was not sufficiently lighted; 5. That rubbish had been suffered to accumulate near the table, whereby access to the belt was cut off from the safe side of the table, and plaintiff was put under the necessity of doing the work from the dangerous side.

Plaintiff's argument on the first ground is that, if the speed of the machine had been less, the belt might have held out until a time when there might have been no rubbish to prevent his doing the work from the safe side, and that in that event he would have escaped injury. Here, in truth, is a string of conjectures. But assuming them all to be established facts, the simple legal answer is that after the belt had given way, and thereby lost its connection with the machine, the speed of

the machine ceased to be an element in the problem, and that therefore, as a cause of the injury, the breaking of the belt stands in the same relation to what followed ⁵⁷¹ as does any other antecedent, conditional fact—as the fact, for instance, that plaintiff was born. Had the belt not broken at the time it did, there would have been at that time no belt to mend, and no injury; and so, had plaintiff never been born, there would have been no plaintiff, and no injury. One group of causes in the chain of causation culminated in the breaking of the belt. Another group was set in motion by the attempt to mend the belt. Juridically the two groups are entirely disconnected, and the law looks only to the latter—in other words, to the immediate or proximate cause: *Schwartz v. New Orleans etc. R. R. Co.*, 110 La. 534, 34 South. 667.

The second ground is equally without merit. The evidence shows—and besides the fact is of itself patent—that the framework of the table is a sufficient guard to the portion of the saw under the table, which is the part that did the injury. It would be exacting too much of an employer to require him to protect such inner and inaccessible parts of machinery, with which no one can come in contact except by such imprudent conduct as that of plaintiff in this case.

As to the third ground, nothing shows that it is negligence not to gear machines like the one in question with a countershaft. The testimony would go to show that machines which run continually are not usually so geared, and that the machine in question ran continually. Furthermore, the testimony shows that this machine is provided with an idler, by means of which it can be disconnected from the rest of the machinery of the mill just as effectually as by means of a countershaft. Beyond this, it appears that plaintiff had the right to stop the machinery of the mill, if necessary, to avoid danger in the work of repair. If, therefore, he incurred any extra risk, he did so voluntarily. If there is a safe and an unsafe way of doing a thing, and the servant knows it, or ought to know it, and chooses the unsafe, and is ⁵⁷² injured, he cannot recover against the master for the injury: *Jenkins v. Maginnis Mills*, 51 La. Ann. 1011, 25 South. 643.

The complaint as to the want of sufficient light has not reference to sufficient light for the regular operation of the mill, but to sufficient light for doing with safety the work of mending. Such being the nature of the complaint, the want of light is obvious. The master is not bound to keep his

premises so lighted that any and all repair work may be done without the necessity of procuring extra light. When plaintiff undertook to do this repair work, it was for him to know whether he had enough light to do it in, and to procure additional light if needed. He was not a green hand, uninformed of the nature of the work he was called upon to do, but he was the person on his floor supposedly best informed in that regard. To him belonged the duty, in his own words, "to fix belts and keep the machines in running shape."

If the rubbish was in plaintiff's way for repairing the machine with safety, he should have asked that it be removed, or should himself have had it removed. He had ample authority for the purpose. In fact, it was his duty to see to the removal of this rubbish if it stood in anybody's way.

The judgment appealed from is set aside, and the suit of plaintiff is dismissed, with costs in both courts.

The Duty of an Employer to Guard or inclose dangerous machinery is discussed in the extended note to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 299. An employer does not furnish a reasonably safe place to work where he places unguarded cogwheels in the immediate vicinity of where an employé works, when it is practicable to guard them: *Buehner v. Creamery Package Co.*, 124 Iowa, 445, ante, p. 354.

On the Duty of an Employer to Light the Premises properly, see *Sawyer v. Rumford Falls Paper Co.*, 90 Me. 354, 60 Am. St. Rep. 260; *Buehner v. Creamery Package Co.*, 124 Iowa, 445, ante, p. 354.

If an Employé Has Two Methods by which he may perform his duties, and he voluntarily chooses the more hazardous one, knowing it to be such, he may be held to do so at his own risk: See the monographic note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 895.

BUECHNER v. CITY OF NEW ORLEANS.

[112 La. 599, 36 South. 603.]

NEGLIGENCE.—Contributory Negligence is Matter of Defense, which, to be availed of, must be pleaded. (p. 457.)

NEGLIGENCE.—Contributory.—The Burden of Proof is on the defendant to show that the plaintiff was negligent, and that his negligence contributed to his injury. (p. 457.)

NEGLIGENCE.—Contributory.—Burden of Proof.—To make out a prima facie case the plaintiff must allege and prove that he was injured by the negligence of the defendant, and it is then presumed that plaintiff was free from negligence. (p. 457.)

NEGLIGENCE—Contributory—Evidence.—Contributory negligence must be pleaded by the defendant as a defense, and if not so pleaded evidence is not admissible to show it. (p. 458.)

NEGLIGENCE—Contributory—Infants.—It is presumed that a child of tender years is not guilty of contributory negligence. (p. 458.)

NEGLIGENCE—Contributory—Infants.—If a child of tender years falls through a hole in a city bridge and is drowned, the question of its contributory negligence is one of fact for the jury, after considering his maturity and capacity, and all of the circumstances of the case. (p. 459.)

MUNICIPAL CORPORATIONS — Negligence — Defective Bridges.—A city owes to the public the duty of keeping its bridges in safe condition, and is liable for special injury resulting from neglect to perform such duty after notice of the defect. (p. 459.)

E. S. Whitaker, assistant city attorney, for the appellant.

A. J. Peters and F. Deibel, Jr., for the appellees.

600 LAND, J. Plaintiffs sued the defendant to recover the sum of fifteen thousand one hundred and sixty dollars damages for personal injuries suffered by their minor son, Albert, and sustained by them by reason of his death, alleged to have been occasioned by his falling through a hole in a defective bridge over the Mobile Street Canal. Plaintiffs alleged that they and their son were without fault. The defendant is charged with negligence in not keeping the bridge in a safe condition, and especially in permitting a dangerous hole in one of the passageways to remain open for some time. The defendant pleaded the general issue. The case was tried, and the result was a verdict for six thousand dollars in favor of plaintiffs. Defendant did not move for a new trial, but took an appeal from the judgment.

During the trial of the case the defendant's counsel asked a witness on the stand the following question: "Then that Mobile Bridge is the most unsafe of the two?" The question was objected to as irrelevant, and the court inquired what was the object of the question. Thereupon counsel for defendant made the following statement, viz.: "The object of the question is to show that there were two routes from the home of this boy to that school, and it was not necessary for him to take the route where this plank was out; that, being an intelligent, bright fellow, he had been warned that there was a hole there, and it had been there for three weeks, and there was another bridge there was no hole like that, which would be more safe, as near for him to take to go to school." Whereupon, witness testified as follows, viz.: "That amounts to contributory negligence, which has not been pleaded." 601 The

objection is sustained." Defendant's counsel reserved a bill of exception.

The question raised by this bill is one of great importance, and the decisions on the subject are confusing, conflicting and unsatisfactory. The weight of the more recent decisions is in favor of the proposition that "contributory negligence is a matter of defense, and, to be availed of, must be pleaded": See 3 *Rapalje & Mack's Digest*, Nos. 75, 76, p. 281; *Beach on Contributory Negligence*, secs. 440-443.

It has been the uniform jurisprudence of the supreme court of the United States that the burden of proof is on defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury: See *Inland etc. Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. Rep. 653, 35 L. ed. 270; *Washington etc. R. R. Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. Rep. 557, 37 L. ed. 284. If this be a correct proposition of law, it follows that defendant must plead what he is bound to prove. What a party does not allege he cannot prove: 2 *Hennen's Digest*, p. 1155, No. 3. *Beach* states that the rule adopted by the United States supreme court prevails in England, and twenty states of the Union, and that defendant, under this rule, must allege and prove the concurrent default of plaintiff: *Beach on Contributory Negligence*, secs. 440-443.

The doctrine that the defendant may prove, without alleging, contributory negligence, rests on the promise that plaintiff must allege and prove, either affirmatively or by inference, that he was without fault. From this point of view, evidence that the injury was occasioned by the concurring fault of the plaintiff is admissible in rebuttal of the evidence adduced on his behalf to show that he exercised due care and caution. Several of our own state decisions enunciate this doctrine in a general way, but the clear cut question is for the first time presented to ~~our~~ this court by objections to the admissibility of testimony to prove contributory negligence. Where the evidence is all in without objection, it is unnecessary to pass on the question of the burden of proof: *Ryan v. Louisville etc. Ry. Co.*, 44 La. Ann. 806, 11 South. 30. But in all cases the preponderance of the evidence as to contributory negligence must be on the side of the defendant. The law presumes, in the absence of evidence to the contrary, that plaintiff was free from negligence: *Baltimore etc. R. R. Co. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. Rep. 137, 48 L. ed. 262.

In order to make out a prima facie case, the plaintiff must allege and prove that he was injured by the fault or negli

of the defendant: Civil Code 1838, art. 2315. It is true, as a general rule, that if the evidence shows that plaintiff was also in fault, and that the concurring fault of both parties produced the injury, plaintiff cannot recover. But it does not follow that plaintiff must allege and prove that he was without fault. Plaintiff is not required to prove that he was without negligence: *Washington etc. R. R. Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. Rep. 557, 37 L. ed. 284.

The defense or plea of contributory negligence is in the nature of a confession and avoidance. It, standing alone, necessarily admits that the plaintiff was injured by the negligence of defendant. Otherwise it is irrelevant. Our opinion is that contributory negligence must be pleaded by defendant, and, in the absence of such plea, evidence is not admissible to show that plaintiff was guilty of negligence. As the plaintiff is required to allege, with legal certainty, injury from the negligence of the defendant, there is no reason why the defendant should not be required to allege the concurring negligence of the plaintiff. Our decision, however, is confined to the particular question raised by the bill of ^{exceptions} exception, and does not conclude the question of contributory negligence arising on evidence admitted without objection, or where it is shown by plaintiff's evidence. The decisions or dicta of this court contrary to the views herein expressed are overruled.

The conclusions which we have reached are in accord with the settled jurisprudence of the supreme court of the United States, which, for the sake of uniformity, should have great and controlling weight in the decision of questions of this nature. The law presumes that a child of tender age is incapable of culpæ, and we have held that the defendant must allege and prove exceptional capacity and maturity: *Westerfield v. Levia*, 43 La. Ann. 69, 9 South. 52. The same principle applies to a case where the law presumes that the plaintiff is free from contributory negligence.

In this court defendant's counsel contends, in his argument and brief, that the evidence does not show with reasonable certainty that plaintiff's son fell through the hole in the bridge over the Mobile Street Canal.

The undisputed evidence is that on the day of the tragic accident, and for a week, or more previously, there was a hole, some three feet in length and from twelve to fifteen inches in width, in the footwalks of the bridge in question. The error in the statement that the hole was large enough

for a man to pass through, and that the general condition of the bridge was very bad. A sergeant of police testified that this condition had been reported to the proper authorities. The child was drowned, in all probability, about noon. His body was recovered early in the evening of the same day. It was found immediately beneath the hole in the bridge. The water was shallow and stagnant, and the mud beneath was soft and deep. ⁰⁰⁴ One of the witnesses said: "When we pulled that boy up, mud and everything came up. The child was underneath the mud."

The witnesses testified to bruises and cuts on the body that might have been readily produced by a fall through the hole in the bridge. Several of them testify to seeming flesh marks on a large nail or spike which was on the inner edge of the hole. All the circumstances point to the conclusion that the child fell through the bridge. The stagnant condition of the water and the deep mud repel the inference that the child fell in the canal at some other point and was borne by current or struggled through the mud and water to the place beneath the bridge where the body was found. Falling through the hole, the impetus of the descent would naturally bury the body in the ooze beneath. There is no circumstance suggesting that the boy met with violence when he was returning home from school on that bright day in June. We are of opinion that the finding of the jury that the boy fell through the hole in the bridge is sustained by the evidence.

There was no plea of contributory negligence. If defendant desired to show that the child was of exceptional capacity and maturity the matter should have been pleaded in the answer: *Westerfield v. Levis Bros.*, 43 La. Ann. 69, 9 South. 52. The boy was between eight and nine years of age. There is no evidence whatever tending to show how the accident happened, and there is no sufficient proof that the boy knew of the existence of the hole. He crossed the bridge a number of times, but usually with his elder brother, and they may have used the other footwalk or the driveway in the center. It was a question of fact for the jury to determine, considering his maturity and capacity and the circumstances of the case, whether he was guilty of negligence in not seeing and avoiding the ⁰⁰⁵ danger: *Succession of Barrett*, 43 La. Ann. 61, and cases therein cited. Even an adult has the right to presume that a public passageway is safe, and is not negligent fo-

not looking for an unlawful obstruction: See *Beach on Contributory Negligence*, sec. 36.

It needs no extended citation of authorities to show that the city owed to the public the duty of keeping the bridge in a safe condition, and is liable for special injuries resulting from neglect to perform this duty: 2 *Dillon on Municipal Corporations*, 3d ed., sec. 1017, p. 1036. The ruinous condition of the bridge was notorious, and it was a trap for the unwary. The verdict is not assailed as excessive in amount.

It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed, defendant and appellant to pay costs of appeal.

Negligence in Dealing with Children is the subject of a monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 406-433. A child is held to the exercise of such a degree of care and discretion only as is reasonably to be expected from children of his age: *Tully v. Philadelphia etc. R. R. Co.*, 2 Penne. 537, 82 Am. St. Rep. 425. See, too, *Mitchell v. Illinois Cent. R. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472; *Heinmann v. Kinnare*, 190 Ill. 156, 83 Am. St. Rep. 123. This rule applies where he is a traveler on a public way: *McDermott v. Boston etc. Ry. Co.*, 184 Mass. 126, 100 Am. St. Rep. 548.

Contributory Negligence is a matter of defense, and he who relies on such negligence as a defense must allege and prove it: *O'Connor v. Missouri Pac. Ry. Co.*, 94 Mo. 150, 4 Am. St. Rep. 364; *Rolseth v. Smith*, 38 Minn. 14, 8 Am. St. Rep. 637; *Nash v. Southern Ry. Co.*, 136 Ala. 177, 96 Am. St. Rep. 19. A contrary rule seems to prevail, however, in some jurisdictions: *Day v. Boston etc. R. R.*, 96 Me. 207, 90 Am. St. Rep. 335, and see the cases cited in the cross-reference note thereto.

The Liability of Municipal Corporations to persons injured by defects in, or want of repair of, public streets, is the subject of a recent extended note to *Dudley v. Flemingsburg*, 103 Am. St. Rep. 257-295.

WARNER v. TALBOT.

[112 La. 817, 36 South. 743.]

DAMAGES—Evidence to Mitigate.—In an action to recover damages for ill-treatment inflicted in an effort to extort information from one suspected of having committed a crime, evidence as to the facts of such crime committed five days prior to such ill-treatment, is inadmissible either as justification, or in mitigation of the damages claimed. (pp. 470, 471.)

APPELLATE PRACTICE—Immaterial Exclusion of Evidence.

In a civil case there is no well-founded complaint to the exclusion of evidence, it becomes immaterial on appeal, whether the verdict of the trial court was right or wrong, since it is the duty

and privilege of the appellate court to apply the law according to its understanding thereof, regardless of what the trial court may have charged. (pp. 470, 471.)

DAMAGES for Mental Terror and Distress.—If a number of citizens, without warrant, take a young man suspected of having committed arson, and who at the time is in attendance upon a grand jury, and abuse him for a number of hours, placing a rope about his neck, and threatening to hang, and making a demonstration of hanging him, for the purpose of extorting from him a confession of the crime, a verdict of five hundred dollars, as damages for mental anguish and terror, is insufficient and will be increased to five thousand dollars, on appeal. (p. 472.)

Hudson, Potts & Bernstein and Kidd & Wallace, for the appellant,

Price & Roberts, Grisham & Mathews, Clayton & Hawthorn and W. R. Jones, for the appellees.

SIS MONROE, J. Plaintiff alleges that he recently resided, and was engaged in the livery-stable business, at Dodson, in the parish of Winn; that the business was prosperous, and that he conducted himself in an orderly and peaceable manner; that upon July 1 and 2, 1902, the defendants, whom he names (forty-eight in number), conspiring together for that purpose, inflicted upon him certain injuries, the particulars of which are set forth as follows:

"That, in pursuance of a common design, purpose and conspiracy agreed upon and formulated by said defendants, the said defendants, violently, forcibly, without warrant of law, with force and arms, and in direct violation of the criminal statutes of the state, assaulted, arrested, and detained your petitioner, marched him, by force and threats, into a lone forest, unfrequented by civilized ^{S10} man, where he was by said defendants threatened, violently abused, ill-treated, wronged, kicked, cuffed, and assaulted, by being struck on the head and body with a loaded pistol, and in other ways; and, finally, after being subjected to the most wicked and cruel outrages, the said defendants tied a rope around your petitioner's neck, threw one end thereof over the limb of a forest tree, and, by pulling thereon, petitioner was painfully drawn from the ground and suspended in the air, where he was allowed to remain until life was almost extinct before being released. That this hanging process was several times repeated and inflicted upon petitioner by defendants, in different places, and, when finally released, he was peremptorily ordered by said defendants to leave his family, his home, and business, and the state of Louisi---

and never to return, under penalty of immediate . . . death. Petitioner avers that all such wrongful, tortious, wicked, and outrageous acts of said defendants were done with a common purpose and intent, in pursuance of a common plan and idea, and in consequence of a conspiracy deliberately, wickedly, and feloniously entered into between all of said defendants, and that they are all bound in solido for the acts of each other, and for the damages caused by the acts of any one or all of the respective co-conspirators. Petitioner avers that, in consequence of the outrages and threats and the number of said defendant conspirators, he has been forced, through fear of his life, to abandon his business, his house and his family, and to seek refuge in different parts of the state; that he is afraid either to return to his home and his family, or to let his present residence be known to said defendants. He avers that his business has been completely broken up by said defendants, that he has suffered great bodily pain and mental agony, and is entitled to reparation therefor."

He demands three thousand dollars for damage to his business, ^{\$20} five thousand dollars for damage to his reputation, and twenty-two thousand dollars for physical and mental suffering.

Exceptions of "no cause of action" and "vagueness" were filed on behalf of all the defendants, and were overruled. The defendants Thomas Walker, William Anders, William Dillard, D. E. Gaar, William Radescich, E. M. Warren, Thomas Montgomery, Silas Wasson, H. Hall, J. T. Payne, and Alonzo Lee then filed a general denial. Joel Smith, J. W. Gaar, P. E. Grisham, A. Smith, Thomas Anders, George Anders, J. C. Smith, M. Dillard, T. L. Jones, C. R. Jones, W. M. Preston, W. H. Mann, Thomas Busby, Lee Busby, J. R. Sykes, P. F. Smith, William Terral, F. F. Walker, H. E. Walker, L. Anders, R. R. Gentry, Fox Deloney, John Deloney, and R. E. Hughes, by way of answer, after denying the allegations of the petition, save as admitted, allege, in substance, that about the 26th of June, 1902, a number of buildings in the town of Dodson were destroyed by a fire, which was generally believed to have been of incendiary origin, and that, as citizens of the town and neighborhood, they determined to make an investigation, and, with that end in view, convened in mass meeting. They aver that there was no intention to injure anyone or to violate the law, and they specially deny that they did so. John Terral, R. H. " " " T. Faith, Mike Gaar, B. M. Stovall, J. A.

Dean, Jule Waters, J. R. Lee, and J. B. Milam amplify the defense as set up in the foregoing answers, as follows: "That the citizens of Dodson came together in mass meeting, and decided and resolved to investigate the origin of the fire and to get all the information that could be obtained for the purpose of prosecuting the guilty parties. That the defendants herein at once proceeded to investigate the matter and get up evidence, and in the course of the investigations were led to believe from the facts ascertained, and from the previous character and reputation of the plaintiff and of Ed. Warner ^{§21} and Rube Brown, that they were the guilty parties, and that they were in a conspiracy to do the burning, and that they thought it best to interview those parties, separate and apart from each other, before they had time to concoct a scheme or tale for defense, and before they were arrested and put in jail together. That defendants proceeded to interview these plaintiffs separately and apart, and for that purpose they placed Rube Brown and Pete Warner under temporary restraint, and that Ed. Warner was not found, but came up afterward, and was also put under temporary restraint. That these parties were all questioned, and that Pete Warner, in the presence of plaintiff, acknowledged that Rube Brown told him that he was going to burn the town, and that Rube Brown also told him, after the fire, that 'we got some of the damned old shacks.' This statement was repeated to Rube Brown in the presence of the other plaintiffs, and Rube Brown did not deny it, but simply said, 'Tell it all, Pete,' or words to that effect. Defendants deny that they inflicted any cruel treatment upon plaintiff, or that they swung him up to a limb, or that he was in any way hurt or injured, and aver that they had no intention to do him bodily harm, but that they were zealous and honest in their investigations, as law-abiding citizens, and that they acted, as the emergency demanded, to save the burning of the balance of the town, as they believed, and to ascertain the origin of the fire, and kept plaintiff in temporary restraint in the course of their investigations, believing, in good faith, that he and the other two parties were connected with the fire in a guilty way. That, when the investigation was over, defendants told the plaintiff and the other two parties that they would have to turn them over to the officers of the law, to which proposition Ed. Warner, the spokesman of the three, suggested, in the presence of Pete Warner and Rube Brown, that all three of them would leave the community rather than ^{§22} be put in jail, to which ---

gestion defendants assented, and they did leave the parish for a time. Defendants deny that plaintiff had a good reputation in the community before or after the fire, but allege that his reputation was not good, and defendants specially deny that plaintiff's character or reputation was injured by them."

It may be stated in this connection that separate suits for damages were filed by Ed. Warner and the plaintiff, and that the testimony taken seems to have been used indifferently in either case. This intimate relation between the two suits will perhaps explain some peculiarities in the language of the answer from which the foregoing excerpt is taken.

The case was tried before a jury, which brought in a verdict for plaintiff in the sum of five hundred dollars, and, the same having been made the judgment of the court (save that the name of Thomas Anders, one of the defendants, has been omitted from such judgment), the plaintiff has appealed, and now prays that he be awarded a larger amount, whilst the defendants answer the appeal, and pray that plaintiff's demand be rejected or the case remanded.

During the trial the plaintiff consented to a nonsuit as to the damages alleged to have been sustained by reason of injury to his character, and the evidence adduced shows that the business in which he was engaged belonged to his brother, from whom he received one-half of the profits in lieu of wages.

A large number of witnesses were examined, and on some points there is conflict of testimony. The facts which we regard as indisputably established are as follows:

Ed., Morgan and Pete Warner are brothers, and, at the date of the occurrences out of which this litigation arises, were about twenty-eight, twenty-three, and twenty-two years old respectively. They are members of a large family, were born and reared in the parish of Winn, and have had few advantages in the way of education. ⁸²³ In November, 1901, Ed. Warner established himself in the livery-stable business in the little village of Dodson, a place of, at most, a few hundred inhabitants, situated on the railroad some ten or twelve miles distant from Winnfield, the parish seat of Winn parish. His stock in trade consisted of about ten horses and half a dozen vehicles, the whole worth, perhaps, one thousand dollars; and he employed his brother Pete and one Jim Sherred to assist him, his brother Morgan being employed in a sawmill in the neighborhood, and the three brothers, together with Rube Brown, a young man of the parish of Bienville, who was engaged, near Winnfield,

in getting out cross-ties, living in a house presided over by the mother of the Warners, and which also sheltered their aunt and younger sister. On the evening of June 25, 1902, a fire supposed to have been of incendiary origin broke out in Dodson, and destroyed some eight or ten buildings, including that in which Warner kept his stable. Upon July 1st following, the grand jury was in session at Winnfield, and Pete Warner went there in obedience to a summons from that body. His brother Ed. was at that time driving a patron through the country, and did not return home until late in the afternoon; Morgan Warner was engaged in his usual work at the sawmill; Brown was engaged in his usual work; and Sherrod, as usual, was in charge of the stable. That being the situation, the defendants, with the exception of L. Anders, William Anders, William Dillard, H. Hall, A. Lee, W. H. Mann, Thomas Montgomery, Thomas Walker, E. M. Warren, and Silas Wasson, together with some other persons who have not been sued, assembled in Dodson, and, after consultation, subscribed to an instrument, in writing, as follows:

"We, the citizens of Dodson and the surrounding community, have reason to believe that our interest is endangered, and we, as a town, are any time liable to be destroyed by fire caused or started by an incendiary. ⁸²⁴ We therefore have met, and each of us whose signature appears below pledge ourselves to keep secret, as near as possible, all facts which might destroy the intention of said meeting. We further agree to stand together as a body of law-abiding citizens in protecting the interest of our town. We further agree, and do ask our citizens as undersigned, to take such steps as may be necessary to the investigation of the recent fire in the town. We each of us solemnly affirm that he will not talk to anyone whose signature does [not] appear below."

When this instrument had been signed, or before, the chairman, by the authority of the meeting, appointed five committees, whose duty it was made to take charge of and interview the three Warners, Brown and Sherrod one committee being assigned to each of the five persons thus mentioned.

The committees so appointed acted promptly, and in accordance with the same general idea as to the function that they were to discharge. "Bill Terral, Redden Sykes, Bob Hughes, and Lee Busby" waited on Morgan Warner at the mill at which he was working, informed him that he was under arrest, remained with him, without permitting him to get out of their

sight, until the whistle blew to stop work, refused to permit him to go home to change his clothing, carried or escorted him to Dodson, and kept him under guard until about 10 o'clock at night. Preston and one of the Terrals "arrested" Jim Sherrod at about 2 o'clock in the afternoon, and held him under guard until after sunset, going with him to the postoffice in order that he might mail a letter, and later, to the stable that he might feed the stock, but never losing sight of him. Talbot, Faith, Dean, Waters, Stovall, John Terral, and Mike Gaar boarded the train for Winnfield in search of Pete Warner, and also of Ed. Warner, whose whereabouts were unknown to them. They found Pete waiting to be called before the grand jury, but they informed him that they ~~saw~~ wanted him to go with them to Dodson, and he consented to go, though, as he walked to the train, one of them walked on either side and held one of his arms. Stovall in the meanwhile bought a rope, which Terral afterward carried in a closed umbrella. On the way back the plaintiff was guarded, without ostentation, but when the train reached a station some distance short of Dodson he was peremptorily ordered to get off, and, with the defendants holding his arms as before, he was marched in the direction of the woods, where he was informed, with a display of pistols and the use of harsh and abusive language, that he was to be hanged, and he was moved about in search of a tree that might answer the purpose of a gallows. When the tree was found, a pistol was brought to bear on him, his collar and necktie were torn off, a noose, which had been made at one end of the rope, was thrown around his neck, and, he says, the other end of the rope was thrown over the limb of the tree, and that he was drawn up in the air. The defendants deny that the rope was thrown over the limb of the tree, or that it was drawn uncomfortably tight on plaintiff's neck, and we will pass that question for the present. The plaintiff was then ordered to tell what he knew about the fire, and, upon his answering that he knew nothing, he was told that he lied, and that his captors would break his neck, shoot out his brains, etc., unless he told what he had said that he did not know. He was then led aside by the rope, which was still encircling his neck, for a private interview with one or two of the defendants, and, the interview not proving altogether satisfactory to them, the hanging demonstration was repeated. The defendants, at least the active participants in the mistreatment of the plaintiff, have that they had agreed that they would scare him by

threatening to hang him or otherwise, but that it was not their attention to do him any serious injury. They, however, concur ⁸²⁶ in stating that their demonstrations were to be given such an appearance of reality as to convince the plaintiff that they were exactly what they appeared to be, and it is generally conceded that they produced that effect. Thus the witness Lean, referred to by the plaintiff, is interrogated, and answers as follows: "Q. That bluff was to be sufficiently strong and convincing to bring forth results, was it not? A. We just wanted him to tell what he knew. Q. You didn't expect to accomplish anything by playing with him? A. Without hurting him. Q. Repeat the question, Mr. Stenographer (which was done). A. We did not play with him."

The witness Talbot, also referred to by plaintiff, is interrogated, and answers as follows: "Q. Did you give him time to pray—to meet his Maker? A. Yes, I told him that if he wanted to do anything of that sort he could do so. . . . Q. Well, you all were very much in earnest in what you were doing down there? A. We felt that way. Q. You didn't try to create the impression that it was a joke? A. No, sir. Q. You tried to make these boys believe that you were going to hang them if they didn't tell? A. Yes. . . . Q. What was the purpose, Doctor, in tying the ropes around the necks of these two boys? A. Why, it was to get them to tell what they knew about the fire. Q. Do you mean that it was to force them, through fear of being hung, to tell what they knew? A. Well, we didn't intend to hang them. Q. Doctor, I understood you to say, before, that you didn't intend to do that, but the question I now ask you [is], if your purpose, in tying the ropes around their necks, was not to compel them, through fear of being hung, to tell what they knew about the fire at Dodson? A. Why, of course that was it. . . . Q. Your manner and language toward these parties, when you held them under arrest, was very determined and very rough and very abusive, in order to make them believe ⁸²⁷ that you intended to do them some great harm if they did not confess to you what you desired or believed that they had knowledge of? A. I didn't say it was rough; of course, it was determined. Q. Was it violent—apparently, I mean? A. It might have appeared that way to them. . . . Q. Suppose one of the boys had resisted or drawn a weapon, would you have used yours? A. That is an opinion, now; I couldn't say. If I thought he intended to use his, I would have used mine. . . . (After

an interval, and on redirect examination.) I would like to explain to the jury that had these parties attempted to liberate themselves, why, I would not have felt justified in shooting one of them, but I meant to have said yesterday, as a matter of self-defense, that, had they attempted to use a weapon on me, I most certainly would have done the best I could on them."

After the second hanging demonstration, the plaintiff, who testifies that he did not desire any further experience of that kind, stated that Rube Brown had told him "that he was going to burn the town, and that he had burned a few of the damned old shacks," and, being confronted with Brown, who was also held by a rope, he or someone else informed Brown that the statement had been made, and the latter said, "Why don't you tell the whole story?" or something to that effect. Brown's case is not before us, nor is that of Ed. Warner, and we need say no more concerning them than that they were taken into the same woods as the plaintiff, and that they were all released, at 10 or 11 o'clock at night, with the distinct understanding that the plaintiff should leave Dodson early the next morning, that Brown should leave within three days, and that Ed. Warner should be allowed ten days within which to settle his business, at the expiration of which he also should leave. The plaintiff left the next morning very early, and without waiting for the train. But during the ^{32d} day the defendants, or a number of them, had another meeting, to which Brown was invited, and as a result of which he left Dodson on the morning of July 3d, having passed the previous night in the custody of one of the defendants, who slept with his pistol by his side, and who, with another of the defendants, accompanied him to the depot and saw that he got off on the train, after buying his own ticket. It is said that the plaintiff left Dodson of his own accord, preferring that course to being turned over to the officers of the law, or to remaining in a town the citizens of which had such a poor opinion of him. We do not find this to be a fact. Our conclusion is, the testimony of the defendants to the contrary notwithstanding, that he was given to understand that his immediate departure and absence from Dodson were essential to his continued existence, and we are inclined to think that the suggestion contained no idle threat.

Returning to the pretermitted question: Was the plaintiff actually suspended by the neck? There is this, among other things, to be said: The plaintiff is the only witness in his own

half who was present, and he testifies, positively and circumstantially, that he was so suspended, and that, on the occasion of his second suspension (to quote his language), "When they let me down, I fell up against Morgan Stovall—I suppose I did, as I was there when I knew where I was at."

Several of the defendants who were present testify that the rope was only five or six feet long, that the limb of the tree was ten feet above the ground, and that the end of the rope was not, and could not have been, thrown over the limb. It is conceded, however, that on both occasions one of the defendants climbed the tree in order to impress the plaintiff with the idea that his purpose was to throw the rope over the limb, and the question suggests itself, how could the defendants have expected to impress the plaintiff with the belief that a rope only five or six ⁵²⁹ feet long, after having been looped around his neck, could be passed over the limb of a tree, ten feet high, and fall down upon the other side far enough to enable them to reach it and thereby lift him off the ground? Beyond this, Dean, a defendant who was on the spot, and who was a member of the committee specially charged with the extraction of information from the plaintiff, testifies that the rope was thrown over the limb, and that he caught it, within a foot or two of the plaintiff's neck, in order to prevent its being tightened from the other side. It is true that the court took a recess about that time, and after the recess the witness corrected his testimony and stated that the rope was not thrown over the limb, but it is also true that he testified after the recess that he had had no particular conversation with anyone during the recess, whereas it was proved conclusively, and without attempt at contradiction, that two of the defendants, who had testified that the rope was too short to go over the limb, had talked to him for some time during the recess with great animation.

Again, Felix Walker, Jr., a witness for the plaintiff, referring to one of the defendants, gives the following testimony, which there has been no attempt to contradict, to wit: "I walked up, and Cyrus Jones turned around and went to talking to me about it, and he told me that Ed. was the biggest coward in the bunch; that he jerked the rope off his neck. I spoke up and said, 'Did you hang him up?' and he says, 'Yes, we hung the s—s of b—s up.'"

Our conclusion, then, is that the plaintiff's allegations as to the circumstances and manner of his treatment are substantially established by the evidence in the record.

On the trial, the defendants offered to prove the facts which led them to suspect that plaintiff had some guilty connection with the fire which had occurred in Dodson on ^{§30} June 25, 1902, and several bills of exception were taken to the ruling of the trial judge in excluding the evidence so offered. The ruling complained of was manifestly correct. Torture is no longer permitted in civilized countries, even as a punishment for crime, and still less can it be tolerated upon the bare suspicion that a crime has been committed, or to extort a confession thereof or an accusation against others. The plaintiff claims only actual damages, and, if the defendants had been allowed to prove their suspicions of his complicity in the fire, such evidence would have been entitled to no weight by way of mitigation, for, even under the authorities which hold that provocation may be shown in mitigation of exemplary damages, the provocation must be immediate, whereas the alleged provocation in this case had occurred five days before the infliction of the injury. In the well-considered case of *Goldsmith v. Joy*, 61 Vt. 48, 15 Am. St. Rep. 923, 17 Atl. 1010, 4 L. R. A. 500, in which the American and English cases upon the subject are reviewed, the supreme court of Vermont say:

"It is a general and wholesome rule of law that whenever, by an act which he could have avoided and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally answerable in damages to the party injured. . . . If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum, and thus practically justify an assault and battery. But why, under this rule, may they not fully justify? If in one case the provocation is so great that the jury may award only nominal damages, why, in another in which the provocation is far greater, should they not be permitted to acquit the defendant, and thus overturn the well-settled law that words cannot justify an assault? On the other hand, if words cannot justify, they should not mitigate."

For the reasons stated above, it is unnecessary to decide whether an immediate provocation ^{§31} can be shown by way of mitigation, since the defendants in this case had no immediate provocation and acted with entire deliberation. Other bills were taken on behalf of the defendants; one to the judge's charge as given, and fourteen to his refusal to give special charges. It is evident, however, that in a civil case, where there is no well-founded complaint of the exclusion of evidence, it

becomes immaterial, on the appeal, whether the charge of the trial judge was right or wrong, since it is the duty and the privilege of this court to apply the law according to its understanding thereof, and regardless of what the trial judge may have charged. Two bills of exception were also taken on behalf of plaintiff, but they are not insisted on, and need not be considered.

The fire in Dodson occurred on June 25th. On July 1st, when the defendants took the plaintiff into their custody, the grand jury was in session at Winnfield, about twelve miles away. The foreman was a prominent citizen of Dodson, and the plaintiff was in attendance, in response to a summons, as a witness. In all probability, therefore, the body charged by law with that function was then investigating the origin of the fire, and the defendants, instead of laying their facts, if they had any, and their suspicions, before that body, removed the witness, who had been summoned to appear before it, and undertook to conduct the investigation, not only outside of the law, but in a manner which reduced the community of which they profess to be the representatives to the level of a lawless and ignorant horde of savages. Whilst, therefore, their professions are those of law-abiding citizens, their conduct was that of anarchists, recognizing no governing power save unbridled passion. The plaintiff in this case is a mere boy, who, though the door was opened for the proof, is not shown ever to have been convicted of any offense, or ever to have been charged with any, save ⁸³² the shooting of an ox, the value of which he paid to the owner, and thereafter recovered in a civil action in which he satisfied the court that he was not guilty of the charge. In the matter of the fire at Dodson, the grand jury, which was in session in July, 1902, brought in no bill against him. The trial of the instant case began on February 5, 1903, and lasted until February 14th, when the jury brought in the verdict. On the 12th of February, during the trial, the grand jury, then in session, found an indictment against the two Warners and Rube Brown, charging them with arson with respect to the fire in question, and the indictment was admitted in evidence, over the objection of plaintiff's counsel, who thereupon offered to prove that a large proportion of the members of the body by whom it had been found were closely related to the defendants in whose behalf it was offered. The evidence was objected to and excluded, and no action by this court in the matter is now invoked. It is, however, stated by counsel for the plaintiff in his brief, and is

not denied by the other side, that the prosecution under the indictment so found was promptly abandoned.

The jury by which the case was tried found "against the defendants, in favor of the plaintiff, for conspiracy, mental anguish, terror and distress, in the sum of five hundred dollars," and, whilst we appreciate their action in thus stamping with disapproval the lawlessness of which the defendants have been guilty, we are of opinion that the amount awarded falls short of compensating the plaintiff. To the mental anguish, terror and distress which he suffered whilst the defendants held him in custody, there is to be added some physical suffering, beyond which there is also to be added the sense of humiliation and disgrace with which he must ever in the future remember that, with a rope around his neck or fastened upon his arm, he was for hours led about, rather like ⁸³³ a dog than even a criminal, with occasional demonstrations of hanging, or actual hanging, as suited the humor of his captors. No amount of money could fully compensate a self-respecting man for such treatment, but five thousand dollars will perhaps come nearer doing so than five hundred, and we shall therefore fix the plaintiff's damages at that amount. There is, we think, error in the verdict and judgment appealed from in another respect. Thomas Walker, William Anders, William Dillard, E. M. Warren, Thomas Montgomery, Silas Wasson, H. Hall, J. T. Payne, and Alonzo Lee have filed a general denial. It does not appear that they signed the instrument of July 1st (copied in the statement which precedes this opinion), nor is there any evidence in the record which connects them with the unlawful acts of which the plaintiff complains. A. B. Anders, Jim Terral, and Lee Terral filed no answer at all, and are connected with the matter only by reason of the fact that their signatures are attached to the instrument mentioned. That instrument is, of itself, harmless, and the evidence de hors the instrument leads us to believe that there were some of the signers who really did not contemplate that anything unlawful would be done, or, rather, it fails to show, as to all the signers, that they had such action in contemplation. And this is true as to the three whose names are last above mentioned. It is also true of D. E. Gaar and William Radescich, who joined in the general denial, and of Joel Smith, J. W. Gaar, John Gaar, P. E. Gresham, A. Smith, Thomas Anderson (against whom no judgment has been rendered), George Anders, I. C. Smith, M. Dillard, T. Jones, Thomas Busby, Lee Busby, P. F. Smith, F. T. Walker,

H. E. Walker, Fox Deloney, and John Deloney, who, in the answer filed by them, admit that they met together and resolved to investigate the fire, but deny that they had any unlawful purpose in view, and as ⁸³⁴ against whom we find no other evidence than their signatures affixed to the instrument mentioned. W. H. Mann and L. Anders make the same defense and are in the same position, save that their signatures do not so appear. Upon the other hand, C. R. Jones, W. M. Preston, J. R. Sykes, William Terral, R. R. Gentry, and R. E. Hughes, who also joined in the answer filed by the defendants last mentioned, not only signed the agreement of July 1st, but are shown to have actually participated in executing it in an unlawful manner.

As to the remaining defendants, i. e., John Terral, R. H. Talbot, Z. T. Faith, Mike Gaar, B. M. Stovall, J. A. Dean, Jule Waters, J. R. Lee, and J. B. Milan, they not only signed the agreement, but, with the exception of Lee, were the persons who took the plaintiff in charge and inflicted upon him the injury of which he complains, beyond which they admit, in the answer filed by them, that they subjected the plaintiff to the unlawful restraint during which he received that injury, and they must be held liable for the consequences.

It is therefore ordered, adjudged and decreed that, in so far as it condemns A. B. Anders, George Anders, L. Anders, Thomas Anders, Lee Busby, Thomas Busby, Fox Deloney, John Deloney, M. Dillard, W. Dillard, D. E. Gaar, John Gaar, J. W. Gaar, P. E. Grisham, H. Hall, T. L. Jones, A. Lee, W. H. Mann, Thomas Montgomery, J. T. Payne, William Radesch, A. Smith, I. C. Smith, Joel Smith, P. F. Smith, Jim Terral, Lee Terral, F. T. Walker, Thomas Walker, H. E. Walker, E. M. Warren and Silas Wasson, the judgment appealed from be annulled, avoided and reversed, and that the demand of the plaintiff be rejected at his cost. It is further ordered, adjudged and decreed that, as to J. A. Dean, Z. T. Faith, Mike Gaar, R. R. Gentry, R. E. Hughes, C. R. Jones, J. R. Lee, J. B. Milan, W. M. Preston, J. R. Sykes, ⁸³⁵ B. M. Stovall, B. H. Talbot, John Terral, William Terral, and Jule Waters, said judgment be amended by increasing the amount thereof from five hundred dollars to five thousand dollars, and, as amended, affirmed, said defendants last mentioned to pay all costs, save such as may have been incurred by their codefendants who are discharged by this judgment, which costs shall be paid by the plaintiff.

Breaux, J., concurs in the decree.

On Provocation as an Excuse or justification for personal violence, see the well-considered case of *Goldsmith v. Joy*, 61 Vt. 488, 15 Am. St. Rep. 923. To mitigate damages by proof of provocation by the injured party, it must ordinarily appear that the act of the offender was committed during the continuance of passion excited by the provocation, and before his blood had time to cool: *Fullerton v. Warwick*, 3 Blackf. 219, 25 Am. Dec. 99; *Jacaway v. Dula*, 7 Yerg. 82, 27 Am. Dec. 492; *Ireland v. Elliott*, 5 Iowa, 478, 68 Am. Dec. 715; *Keiser v. Smith*, 71 Ala. 481, 46 Am. Rep. 312; *State v. Jackson*, 17 Mo. 544, 59 Am. Dec. 281.

GREVENIG v. WASHINGTON LIFE INSURANCE CO.

[112 La. 879, 36 South. 790.]

LIFE INSURANCE—Policy as Evidence.—If a life insurance policy appears on one sheet of paper embracing four pages, the first containing the main contract, the next certain printed conditions and agreements, the next the application and certain acknowledgments and agreements of the applicant, and the last the usual indorsement indicating that the folded paper contains a policy on the life of the insured, the policy consists of the whole document, and an offer to submit it in evidence carries everything on the four pages, rendering it unnecessary to thereafter offer specially the copy of the application for the policy in order to get it before the court. (p. 477.)

INSURANCE—Life—Place of Contract.—A statute of one state providing that no life insurance company, doing business in that state, shall declare any policy lapsed or forfeited for nonpayment of premiums, except after special notice as provided therein, applies only to business transacted in that state and does not apply to a policy issued in that state to a citizen of another state where the policy is delivered and the premium paid. (p. 482.)

INSURANCE—Life—Place of Contract.—If a policy of life insurance is issued in one state by an insurance company incorporated therein, and sent to its agent in another state for delivery therein upon payment of the premium, the contract is completed at the place of such agency and is governed by the law of the latter state. (pp. 482, 483.)

J. J. McLoughlin and F. McGloin, for the appellant.

Merrick & Lewis and P. Gensler, Jr., for the appellee.

see **BLANCHARD, J.** On the 20th of December, 1894, Louis C. Grevenig applied in writing for insurance on his life in defendant company, in the sum of five thousand dollars on the twenty year endowment plan. The application was made in the state of Louisiana, where Grevenig lived, to T. J. [redacted], agent in Louisiana of the company. Among the stipu-

lations contained in the application was one reciting that "neglect to pay the premium on or before the day it became due will render the policy null and void and forfeit all payments made thereon." Another stipulation recited "that the policy of insurance hereby applied for shall not be binding upon this company until the amount of premium as stated therein shall be received by said company, or some authorized agent thereof, during the lifetime of the party therein insured."

Cocke, the Louisiana agent of the company, forwarded the application to the home office in New York, and the company, accepting the same, wrote its policy of insurance in accordance therewith, dated December 24, 1894, on the life of Grevenig, and sent the same to Cocke in Louisiana who there delivered it to Grevenig. Grevenig paid the first premium in Louisiana, presumably at the time of the delivery of the policy to him.

⁸⁸¹ The fact of its payment in Louisiana is shown by the receipt, across the face of which, in red ink, is written "countersigned by T. J. Cocke, agent," and on the margin, in red ink, appears the words "Agency receipt." Cocke, who is thus shown to have received the premium, was in Louisiana, and there was no necessity for his countersigning the receipt if he had not received in Louisiana the premium paid. Had it been paid to the company in New York, there would have been no need for Cocke's signature at all.

Grevenig paid two other premiums on the policy—the one due December 24, 1895, and the one due December 24, 1896. These premiums were paid in Louisiana to Cocke, agent, and the receipts therefor are countersigned by him, and both bear the legend "Agency receipt."

Each of the three receipts contain a stipulation as follows: "This receipt to be valid must be countersigned by the agent on receiving the premium." So Cocke, receiving the premiums in Louisiana, complied with this stipulation by countersigning the receipts. After paying three premiums, and some six weeks prior to the fourth premium falling due, Grevenig, to whom the policy was made payable, assigned the same to his mother, Mrs. Elizabeth Grevenig. The fourth premium on the policy—the one due December 24, 1897—was not paid, nor was any subsequent premium paid.

Grevenig died December 30, 1900. At the date of his death there had been default on four premiums on the policy. That is to say, the premiums that should have been paid the December 24, 1897, 1898, 1899 and 1900 had not been. Following his death, his mother, the assignee of the

treating the same as still in force, brought the present action against the company seeking to recover the full amount of the policy. ⁸⁸² The company defends on the ground of the forfeiture and lapsing of the policy by reason of the nonpayment of the premiums due thereon. There was judgment below for the defendant and plaintiff appeals.

Ruling: The policy of insurance in question was annexed to and made part of plaintiff's petition, and when it came to the offering of evidence, plaintiff's counsel offered in evidence "the policy of life insurance sued on in this case, No. 89,618."

The number given is that of the policy. This policy, as annexed to the petition and offered in evidence, appears as one large sheet of paper, embracing four pages. On the first page is the main contract of insurance, wherein is recited that the policy is issued in consideration of the representations made in the application for the policy and the payment of the first premium and those thereafter to fall due; and wherein it is further recited that the policy is issued and accepted by the assured upon the conditions and agreements printed by the company on the inside of the policy, which conditions and agreements are accepted by the assured as part of the contract, and to them is given the same force and effect as if printed in full over the signatures which appear on the first page, or at the foot of the main contract.

On the second page of the policy, which would be one of the inner pages, we find under the heading "Conditions and agreements referred to and forming part of this policy" certain printed stipulations not now necessary to refer to. Then on the second inner page, which would be the third page of the sheet, we find under the heading "Copy of application for this policy" a copy of the application, which contains not only the questions and answers usual to be asked and given in such applications, but also certain acknowledgments and agreements on part of the applicant—the whole over his signature.

⁸⁸³ Then on the fourth page of the sheet—the last and outside page—we find this indorsement:

"No. 89,618.

"WASHINGTON LIFE INSURANCE CO.

Age

33

Amount

\$5,000.00

"Died December 24, 1894.

"Policy payable at death, or 52 payments \$244.55.

"or at the 24th day of December annually."

We hold that "the policy" of insurance issued in this manner and form to Grevenig included what was written and printed on the four pages, and when the offer was made of "the policy" in evidence by plaintiff's counsel, without reservation, it carried everything on the four pages. Thereafter it was not necessary for defendant's counsel to offer specially the copy of application for the policy in order to get it before the court.

Both in the main contract of insurance and in the application which is made part of the policy, the continued life of the policy is made dependant on the payment of the annual premiums. The policy stipulates for the lapsing and forfeiture of the contract by reason of the nonpayment of the premiums. The evidence establishes the lapsing of the policy. The officials of the company give as the date of this lapsing the 24th of December, 1897, which was the date for the payment of the fourth annual premium. There is no contention on part of the plaintiff that the December, 1897, premium was paid, nor that any premium subsequent thereto was paid or tendered.

Not only were the four annual premiums preceding the death of the assured not paid, but no effort seems to have been made to pay them, nor to save the forfeiture, nor to set aside the forfeiture after the same was apparently accomplished.

884 The premiums were not paid, and Grevenig and his mother, with whom he lived, and to whom he had assigned the policy, appear to have accepted the situation—doing nothing toward looking after the policy and keeping it alive. Evidently they considered it lapsed, for they seem to have made no inquiries concerning it, nor any longer bothered themselves with it or about it. Not until the son's death does the mother appear to have concerned herself with it, and while she and the assured quietly stood still and permitted four years to elapse without paying or offering to pay premiums, and permitted the company to mark the policy off its books as a policy lapsed, she now seeks to have it decreed no forfeiture had occurred and that the policy is still in force.

Her contention is that notice of the falling due of the premiums was not given and because of this lack of notice forfeiture could not be declared by the company. We find nothing in the policy requiring such notice, and no statute of Louisiana is cited requiring the same. But it is claimed that by the insurance laws of the state of New York, the domicile of ^{the} company, such notice is required, and that the policy ^{terms} refers to these laws, and, hence, they are to be considered as incorporated in the contract and control it.

We find no general reference in the policy to the insurance laws of New York, and making the same part thereof. We do find a special reference to section 88 of chapter 690, page 1969 (as we understand it) of the laws of New York, passed in 1892, but this section, which is recited in the policy, relates only to the surrender value of lapsed or forfeited policies, and in no wise refers to notices to be given of the falling due of premiums, or requires such notice. There is no reference, general or special, to any statute of New York relating to the giving of notice and requiring the same as a ~~condition~~ condition precedent to the lapsing of the policy of insurance.

Under these circumstances the case comes within the rule applied in *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. Rep. 106, 45 L. ed. 181. In that case the insurer was a New York company; the assured a resident of Montana. So in the case at bar the insurer was a New York company, the assured a resident of Louisiana. In the *Cohen* case, the policy was written in New York, but delivered in Montana, where the premium was paid. In the case under consideration the policy was written in New York, but delivered in Louisiana, where the first and subsequent premiums were paid. Held, in the *Cohen* case, that "under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that state": Citing *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 232, 11 Sup. Ct. Rep. 822, 35 L. ed. 497.

"In that state," continued the court, "there being no statutory provision to the contrary, the failure to pay the premium worked, in accord with the terms of the policy, a forfeiture of the claims against the company": See, also, *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 347, 23 Sup. Ct. Rep. 126, 47 L. ed. 204. Then addressing itself to the contention that the law of New York, where the policy was written, required notice of maturity of premiums to be given before a forfeiture could be declared, the court in the *Cohen* case continued: "This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover."

A discussion then follows as to whether the law of New York and it was held it did not, since the policy of insurance, incorporate the law of that state its provisions in that respect con-

trolling upon the assured and insurer. The ruling of the court on the point is summed up in the syllabus of the case as follows: "The provision in the statutes of New York that 'no life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided,' does not apply to or control such a policy issued by a corporation of New York in another state, in favor of a citizen of the latter state, but is applicable only to business transacted within the state of New York; and in such case the rights of the parties are measured by the terms of the contract."

But the plaintiff insists that even if the policy evidence a Louisiana contract, still was the company compelled to send out notices of the falling due of premiums since it had adopted the custom to do so in its dealings with its policy-holders in Louisiana, and without such notice the policy did not lapse and its forfeiture could not be legally declared. Evidence to show such a custom was objected to by defendant because not alleged in the petition. It was, however, admitted by the trial judge.

Waiving the objection thus made, we think it reasonably established by the evidence that notice of the falling due of the premium which matured in December, 1897, was sent out. It was the failure to pay this premium that caused the policy to lapse. The assignment of the policy to the plaintiff was made in November, 1897. The paper witnessing the assignment was produced and filed in evidence by the plaintiff. It names Mrs. Grevenig, mother of the insured, ⁸⁸⁷ as the assignee and gives her only address as "New Orleans, La."

Supposing, then, that notice of the maturity of the premiums was necessary to be sent her, such a notice addressed to her as of New Orleans, Louisiana (since that was the only address given) and mailed sufficed. That she did not get the notice would make no difference. She testifies she received no notice, and that is the only evidence in the record tending to show notice was not sent. She was testifying in 1902, about four and a half years after the time when the notice was sent, or was due to be sent. The custom of the company to send out notices of the falling due of premiums to those persons living in Louisiana who held its policies is abundantly shown, and this, too, by witnesses called by the plaintiff.

Cocke, as we have seen, was the agent in New Orleans of the company at the time the policy on Grevenig's life was taken out, and remained its agent until April, 1897. Afterward Henderson's Son & Co. became the agents. Both Cocke and W. H. Henderson, of the firm of that name, testify to the invariable rule of the company to send out the notices. Indeed, they testify that two notices were always sent—one about thirty days prior to the maturity of the premium and one later. It is also shown that when there had been an assignment of a policy these notices were invariably sent to the assignee. Other witnesses—themselves policy-holders in defendant company in New Orleans—testified to receiving, always, in advance of the maturity of the premiums on their policies, notices of the falling due of the premiums.

The establishment by the testimony of the invariable custom to send out these notices leaves no room for reasonable doubt that the custom was followed in the case of Grevenig, or his assignee, who lived in the same house with him for three years before he died. Besides, it is shown that a member of the ⁸⁸⁸ firm of Henderson's Son & Co., plaintiff's agents at the time of the failure of payment of the December, 1897, premium, was sent to see Grevenig personally about his failure to pay the premium, and had repeated interviews with him on the subject, and still the premium was not paid. And following this both Grevenig and his mother—his assignee—did absolutely nothing to restore the policy and maintain it as an existing contract of insurance, though the insured lived three or four years subsequent to the time when the December, 1897, premium should have been paid.

We have reserved until now notice of an objection made by plaintiff's counsel to certain evidence, which objection is insisted on. The objection was to testimony showing that the policy of insurance was delivered to Grevenig in Louisiana, and that the premiums were paid to the company's manager in that state. The ground of the objection was that it was an attempt to contradict the written contract by parol.

The trial judge did not err in overruling the objection. The testimony contradicted nothing in the policy. The statement in the policy that the premium was paid was but confirmed by the testimony objected to, which shows it was paid in Louisiana at the time the policy was handed the insured. It was the payment of the premium and the delivery of the policy

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to the insured that completed the contract in this instance such was the evident contemplation and intention of the parties.

Finally, it is insisted by the plaintiff that even if the policy had lapsed, it had, by reason of the fact that three premiums had been paid, a cash value of four hundred and sixty-five dollars, which amount plaintiff should be decreed to recover. There is no merit in this contention. Grevenig accepted a policy which stipulated he could do one of two things in case there was a default in the payment of the premium. He could take paid-up insurance "on a ~~one~~ demand made with a surrender of the policy within six months after such lapse or forfeiture," or the premiums paid being used in force on a certain reserve as long as the reserve taken as a single premium would purchase temporary insurance for such amount, "as shall have been agreed upon in the application or policy."

The plaintiff in the application agreed to take paid-up insurance on the terms stated. That is, he agreed to surrender his policy within six months of the lapse or forfeiture and take paid-up insurance for an amount predicated on the payments he had made. He did not surrender the policy, nor did he even apply for the paid-up insurance. The same is true of his assignment.

ON REHEARING.

LAND, J. Plaintiff's right to recover is dependent on her maintaining the contention that the policy sued on was in full force and effect when the assured died, on December 30, 1900. The policy was issued on December 24, 1894, and was assigned to plaintiff on November 16, 1897. The initial premium and the annual premiums maturing in 1895 and 1896 were paid. Plaintiff admits that she paid other premiums for an amount predicated on the payments but she testified that she received no notices that the premiums were due or were in arrears. Hence her case rests on the assumption that the policy continued in force, and that the policy sued on, it was rendered void by the fact that the policy was not renewed and that the amount of premiums was not paid.

stated therein ⁸⁹⁰ shall be received by said company or some authorized agent thereof, during the lifetime of the party therein assured." Hence the mere execution of the policy in the state of New York did not bind the company, and the contract was perfected by the payment of the initial premium by the assured to an agent of the company in the state of Louisiana.

The receipt covering the first premium stated that "this receipt to be valid must be countersigned by the agent receiving the premium," and it was countersigned by the agent in New Orleans. The New York insurance laws provide that no life insurance company doing business in the state of New York shall have the power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest, or of any portion thereof, except as specially provided therein. The provision referred to requires written or printed notice, stating amount of premium or interest due, the place of payment, and the person to whom payable, to be mailed to the address of the assured or the assignee.

In the case of *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. Rep. 106, 45 L. ed. 181, the court held that the statute of New York does not apply to a policy issued by a corporation of New York in another state, in favor of a citizen of the latter state, but is applicable only to business transacted in the state of New York. The court said: "The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the state of Montana. Under these circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of the state."

After discussing the insurance statute of New York, the court further said: ⁸⁹¹ "These considerations lead to the conclusion that the statute of New York, directed as it is to companies doing business within the state, was intended to be, and is in fact, applicable only to business transacted within that state." The supreme court of the United States decided the *Cohen* case on two propositions of law, to wit, first, that the place of the contract was where the premium was paid and the policy delivered; and, secondly, that the New York statute had no application to business transacted out of that state: Citing *Equi-*

table Life Assur. Soc. v. Clements, 140 U. S. 226, 11 Sup. Ct. Rep. 822, 35 L. ed. 497, as to the place of the contract.

May on Insurance says: "And if the policy be sent to the agent for delivery on receipt of the premium the contract is completed at the agency": May on Insurance, sec. 66. The policy sued on was a Louisiana contract, since by its terms it was not binding on the company until the premium was received and the premium was paid to its agent in Louisiana, who thereupon countersigned the receipt and delivered the policy to the assured.

It is therefore ordered, adjudged, and decreed that our former judgment rendered herein be reinstated as the decree of the court.

LIFE INSURANCE, CONFLICT OF LAWS RESPECTING NON-FORFEITURE OF POLICY.

I. Effect of Statute on Business Done and Policies Issued in Another State.

a. General Rule, 483.

b. Effect of Inserting in Contract Provision that It shall be Governed by Law of Certain State, 485.

II. Place of Delivery of Policy or Payment of Premium.

a. Under Stipulation in Policy, 488.

b. In Absence of Express Stipulation, 489.

I. Effect of Statute on Business Done and Policies Issued in Another State.

a. General Rule.—Although there is some conflict of authority, the question whether the statute of one state, where an insurance company is incorporated, providing that no life insurance company doing business in that state shall declare forfeited or lapsed any policy of insurance for nonpayment of premiums, except after special notice provided for therein, has any application to business transacted in another state, was correctly determined in the principal case. This precise question first received judicial attention in the case of *Griesemer v. Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031, wherein it was held that the provision of the New York statute regulating the manner in which life insurance companies doing business in such state may declare any policy of insurance forfeited or lapsed by reason of nonpayment of any annual premium affects the policies issued in that state, whether by foreign or domestic companies, but has no application to policies not issued therein, although the companies issuing them may have been organized under the laws of that state. The question was considered by the supreme court of the United States in the case of *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. Rep. 106, 45 L. ed. 181, and there decided that the provision of the New York statute that "no life insurance company doing business

in the state of New York shall have power to declare forfeited or lapsed any policy thereafter issued or renewed, by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided," and then providing for special notice to the insured, does not apply to or control such a policy issued by a corporation of New York in another state, in favor of a citizen of the latter state, but is applicable only to business transacted within the state of New York, and in such case the rights of the parties are measured by the terms of the contract. Other decisions are to like effect. Thus, in Texas, it has been decided that an insurance corporation created by the laws of another state does not bring with it into the state of Texas the general statute laws of the state of its creation: *Seiders v. Merchants' Life Assn.*, 93 Tex. 194-198, 54 S. W. 753; *Fidelity Mut. Life Assn. v. Harris*, 94 Tex. 25-34, 86 Am. St. Rep. 813, 57 S. W. 635. And in a late case in Texas it was expressly decided that where an application for a life insurance policy in a New York company is made, and the policy is delivered in Texas, a New York statute prohibiting forfeitures for the nonpayment of premiums, unless written notice shall have been duly given to the insured, forms no part of the contract of insurance, though the policy itself provides in general terms, without reference to the New York law, for a notice of accruing premiums: *Cowen v. Equitable Life etc. Soc.* (Tex. Civ. App.), 84 S. W. 404. A late expression of high authority on this topic is found in *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551-554, 24 Sup. Ct. Rep. 538, 48 L. ed. 789, reversing the same case, on appeal from the circuit court as reported in 118 Fed. 708. In the former case it is said that "the statutory provision of the state of New York, in reference to forfeitures, has no extraterritorial effect, and does not of itself apply to contracts made by a New York company outside of that state": *Mutual Life Ins. Co. v. Hill*, 193 U. S. 554, 24 Sup. Ct. Rep. 538, 48 L. ed. 789. The contrary doctrine, however, is sought to be maintained by some courts. Thus, in *Equitable Life etc. Soc. v. Frommhold*, 75 Ill. App. 43, it was held that the New York statute under consideration and mentioned above, was a limitation upon the power of a New York life insurance company, and applied whether the contract was deemed to have been made in New York or Illinois, and the court expressed the opinion that inasmuch as the application was forwarded to New York and there accepted, and the policy was there issued and returned to Chicago for delivery, and the premiums and amount insured were, by the terms of the policy, expressly made payable in New York, authority is not wanting to support the proposition that New York was to be regarded as the place of the contract; citing *Phinney v. Mutual Life Ins. Co.*, 67 Fed. 493. In the last-cited case it appeared that a New York life insurance company issued a policy on an application made and signed in the state of Washington and transmitted to New York, where the policy was written, and then sent to the state of Washington, where it was

delivered to the insured and the first premium collected. The policy provided that the premiums and the insurance should be paid in New York, and proof of death should be made there. The application for insurance, made a part of the policy, declared that it was made subject to the charter of the insurance company and the laws of New York, and the court held that the contract, as to all matters relating to its performance, was governed by the laws of New York, and was therefore subject to the statute of that state providing for the forfeiture of the policy for nonpayment of premiums, although the policy contained a waiver of any other notice as provided for in the statute than the terms of the policy itself: *Phinney v. Mutual Life Ins. Co.*, 67 Fed. 493; reversed, but on another point, in *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. Rep. 906, 44 L. ed. 1088. And to same effect is *Mutual Life Ins. Co. v. Dingley*, 100 Fed. 408, 49 L. R. A. 132. In the late case of *Mutual Life Ins. Co. v. Hill*, 97 Fed. 263, 49 L. R. A. 127, and *Hill v. Mutual Life Ins. Co.*, 113 Fed. 44, it appears that an application for life insurance in a New York company, made in the state of Washington, contained a provision that "the contract of insurance, when made, shall be held and construed to have been made in the city of New York," and the policy recited that "in consideration of the application for this policy, which is hereby made a part of this contract." The contract was delivered and the first premium paid in Washington, and it was held that the policy was a New York contract and governed by the statute of that state. This case was expressly overruled and reversed on appeal by the supreme court of the United States in the case of *Mutual Ins. Co. v. Hill*, 193 U. S. 551, 554, 24 Sup. Ct. Rep. 538, 48 L. ed. 789, where the court said that it has become established law that the statutory provision of New York in reference to forfeiture of life insurance policies has no extraterritorial effect, and does not of itself apply to contracts made by a New York company outside of that state, and that parties contracting outside of the state of New York cannot by agreement incorporate into the contract the laws of that state and make their provisions controlling upon both parties, when such provisions are in conflict with the law or public policy of the state in which the contract is made, and it was also held that notwithstanding the stipulations in the policy, it was a contract made in the state of Washington and not in New York, because the first premium was paid and the policy delivered in the former state: *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551-554, 24 Sup. Ct. Rep. 538, 48 L. ed. 789; citing *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226-232, 11 Sup. Ct. Rep. 822, 35 L. ed. 497; *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. Rep. 106, 45 L. ed. 181.

b. Effect of Inserting in Contract Provision that It Shall be Governed by Law of Certain State.—The cases also establish the rule that an insurance company organized in one state cannot by its contract incorporate therein the laws of that state so as to make them con-

trol the contract, if the insurance contract is really perfected and executed in another state in favor of a resident thereof, and this is especially the case if there is a conflict of laws between the two states. In other words, if a contract of life insurance is in fact made within a state between a resident thereof and a foreign insurance company, the parties cannot avoid statutory provisions of the state declaring a rule of public policy with respect to such contracts made within its jurisdiction, by inserting in the policy provisions adopting the law of another state: *Albro v. Manhattan Life Ins. Co.*, 119 Fed. 629. Thus, if the payments of premiums by and the delivery of the policy to the insured, are made conditions precedent to the completion of the policy's execution, and the premiums are paid and the policy delivered to him in one state, it must be held that the policy is executed there, although the insurance company issuing it is incorporated under the laws of another state, and has its chief office there, and the policy and application provide that the contract contained therein shall be construed according to the law of such other state, and that the place of the contract is expressly agreed to be in such other state. Such a contract, if executed in another state than the place of incorporation of the company, is subject to the laws of such state, anything in the contract of insurance notwithstanding: *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519, 53 L. R. A. 305. This is an intensely interesting case containing an exhaustive review of the authorities, and was affirmed by the supreme court of the United States, in *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. Rep. 962, 44 L. ed. 1116. The same rule was reaffirmed, in *Pietri v. Seguenot*, 96 Mo. App. 258, 69 S. W. 1055, where it is said: "The terms of the insurance policy declare that it 'shall be construed only according to the laws of New York,' and that the 'place of this contract is expressly agreed to be the home office of said association in the city of New York.' Nevertheless, the policy was delivered by the insurer in Missouri, of which state the insured at the time was a resident. The laws of this state then in force thereby entered into and became part of the contract of insurance between the parties so far as concerns the interpretation and effect of the terms of insurance to which those laws applied. The making of the insurance contract here between the company and a resident of Missouri impressed upon the transaction the then existing laws of this state, governing such transactions": *Pietri v. Seguenot*, 96 Mo. App. 263, 69 S. W. 1055.

A provision in a policy of life insurance issued by a New York company, providing that it "shall be governed by and construed only according to the laws of New York," does not constitute the statutes of that state the laws by which it shall be construed, when the contract is made and the policy delivered in another state, and the insufficiency of a notice of the maturity of a premium under the New York statute relating to such notices is immaterial in an action on

the policy in another state: *Mutual Reserve Fund etc. Assn. v. Minehart* (Ark.), 83 S. W. 323. A stipulation, in an application for life insurance, made in another state to a New York life insurance company, that the application is subject to the charter of the company and the laws of New York, is not sufficient to make the policy issued thereon, and afterward delivered in such other state, subject to the laws of the former state making it a condition of the company's right to forfeit a policy for nonpayment of premiums that the notice of the accruing of premiums shall be given to the insured: *Mutual Life Ins. Co. v. Hathaway*, 106 Fed. 815. A life policy issued by an insurance company of another state to a citizen of yet another state on an application made through an agent of the company in the latter state, and assigned to a citizen of that state, must be construed according to the laws thereof, although it is, by a condition inserted in the contract, expressly made a contract of such other state: *Robinson v. Hurst*, 78 Md. 59, 44 Am. St. Rep. 266, 26 Atl. 956. This case is opposed in principle at least by an earlier case in the same state holding that the statute law of the state of the incorporation of the insurance company governs the construction of a policy of insurance issued to a citizen of another state. This decision is based upon the ground that such statute constitutes a limitation upon the power of the insurer, and the court says: "Even within and without the state which created it its contracts are limited, construed and sustained according to its charter and the laws which effect its operation": *Fidelity Mut. Life Assn. v. Ficklin*, 74 Md. 172-180, 21 Atl. 680, 23 Atl. 197. And to the same effect is the case of *Pennsylvania Mut. Life Ins. Co. v. Mechanics' Sav. Bank*, 72 Fed. 413, 38 L. R. A. 33. In *Guesemer v. Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031, it was held contrary to the general and better rule that if the policy expressly provides that it is a contract made and to be executed in another state, and shall be construed only according to the charter of the company and the laws of that state, it must be construed as executed and delivered in that state, and subject to the laws governing policies issued in that state, though in fact executed and delivered in a foreign state. It is undoubtedly the better rule that although a life insurance company organized in another state provides in its applications and policies that the contract of insurance shall be deemed a contract made in the state of its incorporation, yet it must be governed and construed according to the laws of the state where the insured resides and where the contract is finally made or executed: *Summers v. Fidelity Mut. Aid Assn.*, 84 Mo. App. 605; *Wall v. Equitable Life Assur. Soc.*, 32 Fed. 273; *Hicks v. National Life Ins. Co.*, 60 Fed. 690, 9 C. C. A. 215; *New York Life Ins. Co. v. Russell*, 77 Fed. 94, 23 C. C. A. 43.

Of course, it seems clear that if a life policy of insurance is issued by a corporation of one state to a citizen of some other state, signed and delivered at the home office of the corporation, and calling for

the payment of the premiums and insurance there, it is a contract made in the state of incorporation and governed by its laws, regardless of stipulations in the contract: *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102; *Seely v. Manhattan Life Ins. Co.*, 72 N. H. 49, 55 Atl. 425.

II. Place of Delivery of Policy or Payment of Premium.

a. **Under Stipulation in Policy.**—As shown by the foregoing authorities the important question to be first determined in cases of life insurance involving a conflict of laws, is the place where the contract is in fact made or finally executed. When this question is solved, the determination of the questions as to the construction to be placed upon the terms of the contract, and of the laws which are to govern such construction are comparatively easy, because it is an almost universal rule that the contract of insurance must be governed by the law of the state where such contract is finally consummated by the delivery of the policy, the payment of the premium, or other act of finality. Whatever may be the law in the absence of an express stipulation in the contract that the policy shall not take effect until the payment of the first premium, or until the payment of the first premium and the delivery of the policy, it is now well established that when there is such an express stipulation as there was in the principal case, and the first premium does not accompany the application, but the company forwards the policy to its local agent in another state, who delivers it to the insured residing there, upon receipt from him of the first premium, the contract is deemed to have been made in the state where the policy is thus delivered and the premium paid, and not in the state where the application was accepted and from which the policy was issued. In such case the contract of insurance is governed by the laws of the state where the insured resides, where the policy was delivered and the first premium paid, notwithstanding stipulations to the contrary which may be contained in the application or in the policy: *Ford v. Buckeye State Ins. Co.*, 6 Bush, 133, 99 Am. Dec. 663; *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519; affirmed, *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. Rep. 962, 44 L. ed. 1116; *Fidelity Mut. Life Ins. Assn. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. Rep. 822, 35 L. ed. 497; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. Rep. 962, 14 L. ed. 1116; *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. Rep. 106, 45 L. ed. 181; *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. Rep. 538, 48 L. ed. 789; overruling and reversing the same case as reported in 97 Fed. 263, 49 L. R. A. 127, and 113 Fed. 44; *Northwestern Mut. Life Co. v. Elliott*, 5 Fed. 225, 7 Saw. 17; *Knights Templar etc. Co.*, 50 Fed. 511, 1 C. C. A. 561; *Mutual Ben. Life Ins. Co. v. on*, 54 Fed. 580; *Albro v. Manhattan Life Ins. Co.*, 119 Fed.

629. A contract of insurance is executed at the place where the last act is done which is necessary to complete the transaction and bind both parties. This act may be the issuance of the policy and its transmission by mail, but if by stipulation something further remains to be done in another state, as the approval and receipt of premium notes by an agent in that state, and the delivery of the policy by him in the same place, that state will be the place of the contract, and not the state where the policy was issued: *Ford v. Buckeye State Ins. Co.*, 6 Bush, 133, 99 Am. Dec. 663. And if a contract of insurance is delivered in one state and the premiums are there paid, upon performance of the conditions precedent that the premiums shall be paid, and that the policy shall be delivered to the insured during his life, and good health, the contract is executed in that state, although the insurance company is incorporated under the laws of another state, and has its chief office there, and this is true although it is expressly agreed in the application and policy that the place of the contract is such other state, and that the contract shall be construed according to the laws thereof: *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519; affirmed in *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. Rep. 962, 44 L. ed. 1116. This rule is again announced and affirmed in *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. Rep. 538, 48 L. ed. 789, overruling and reversing the same case as reported in 97 Fed. 263, 49 L. R. A. 127, and 113 Fed. 708.

b. *In Absence of Express Stipulation.*—The difficulty in determining the place where the contract of insurance is made and finally executed arises when the policy is issued and mailed by a foreign insurance company to its agent in another state, and by him delivered to the insured without collecting a premium, and without any conditions or stipulations imposed as to when the contract is to take effect. The question must then be determined whether there is any implied condition precedent, subsequent in point of time to the acceptance of the application which is to be performed in the state of the insured's residence to complete the contract. Although there is great conflict in the authorities, the better rule is that a policy of life insurance issued by a foreign company which is delivered by the local agent to the insured at the place of his residence in another state is governed by the laws of that state, being a contract made and completed therein, and is not governed by the laws of the state where the insurance company is incorporated, notwithstanding stipulations in the application or policy that it shall be governed by the laws of the latter state. This rule is especially strong when applied to cases where the policy is delivered by and a premium collected by the local agent in the state where the insured resides, but it also prevails when the policy is thus delivered without the payment of any premium. In the following cases, in which, after the acceptance of the application, the policy

was mailed by a foreign insurance company from its home office to its local agent and by him delivered to the insured at the place of his residence, it was held, whether a premium was then collected or not, that the contract was made in the state in which the policy was thus delivered, although, so far as appears, there was no express stipulation imposing any condition precedent to the taking effect of the policy after it was issued at the home office: *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134, 30 S. E. 273, 42 L. R. A. 88; *Wiestling v. Warthim*, 1 Ind. App. 217; *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Stevens v. Rasin Fertilizer Co.*, 87 Md. 679, 41 Atl. 116; *Expressman's Mutual Benefit Assn. v. Hurlock*, 91 Md. 585, 60 Am. St. Rep. 470, 46 Atl. 957; *Hicks v. National Life Ins. Co.*, 60 Fed. 690, 9 C. C. A. 215. If an application for a policy of insurance is made in one state to an agent of foreign insurers, and is sent by such agent to their office in another state, and the policy is there made and sent to the agent for delivery, and by him delivered to the insured in his state of residence, the latter having no previous notice of the acceptance of his application, the contract of insurance is to be regarded as made in the latter state and subject to the provisions of the statutes thereof: *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291, 33 Atl. 731. In the following cases it is expressly held that if an application for life insurance is made in one state by a resident thereof to a foreign insurance company, and the first premium is paid and the policy delivered in that state by a local agent, the policy is a contract made in that state and is governed by the laws of that state then in force: *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Berry v. Knights Templar etc. Co.*, 46 Fed. 439; *Equitable Life Assur. Soc. v. Winning*, 58 Fed. 541, 7 C. C. A. 359; *Fidelity Mut. Life Assn. v. Jeffords*, 107 Fed. 402, 53 L. R. A. 193, 46 C. C. A. 377; *Kelley v. Mutual Life Ins. Co.*, 109 Fed. 56; *Carrollton etc. Co. v. American etc. Co.*, 115 Fed. 77, 124 Fed. 25. In a number of cases it is further maintained that a policy of life insurance issued by a foreign life insurance company, through its local agent, and delivered and the premium paid by the insured in the state where he resides, is a contract made in that state and governed by its laws, although the policy contains a provision that the contract shall be governed by and construed only according to the laws of the state under which the insurance company was organized: *Dolan v. Mutual Reserve Fund Life Assn.*, 173 Mass. 197, 53 N. E. 398; *Millard v. Brayton*, 177 Mass. 533, 83 Am. St. Rep. 294, 59 N. E. 436; *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356; *Albro v. Manhattan Life Ins. Co.*, 119 Fed. 629. In *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356, it was held that although the insured expressly agreed in his application that the contract of insurance should be governed by the law of another state, yet as it appeared that the company's agent in where the insured lived and the application was taken had ity to bind the company to a contract of insurance to date

from the acceptance of the application, before the delivery of the policy, and as it was not shown that the premium called for by the policy was paid in advance when the application was made, and it was shown that the company treated it as a transaction consummated upon the delivery of the policy and the payment of the premium in the state where the insured resided, he having no notice that his application had been accepted, until the policy was delivered to him, it must be held that the contract of insurance was not complete until the delivery of the policy, and therefore a contract made in and to be governed by the laws of the latter state. In this connection it has also been held that if a contract of insurance is in fact made, and the first premium paid within a state, between a resident thereof and a foreign insurance company legally doing business therein, the parties cannot avoid statutory provisions of that state, declaring a rule of public policy with respect to such contracts made therein, by inserting provisions in the policy adopting the laws of another state: *Albro v. Manhattan Life Ins. Co.*, 119 Fed. 630. Authority is not wanting to sustain the proposition that, in the absence of an express stipulation to that effect, delivery of the policy is not essential to the consummation of the contract of insurance, and that the place of delivery does not necessarily determine the place where the contract is made. In the following cases it is held that the contract must be regarded as made in the state in which the home office is situated, and in which the application is accepted, and from which the policy is forwarded to the local agent in another state, where the insured resides, and by such agent delivered to the insured with or without the payment of a premium to him, if the policy corresponds to the application and no conditions precedent to the taking effect of the contract are expressly imposed. These cases hold that the contract is one made at the home office of the insurance company and governed by the laws of that state, in the absence of a conflicting statute in the state where the insured resides and where the policy is delivered: *Smith v. Mutual Life Ins. Co.*, 5 Fed. 582; *Shattuck v. Mutual Life Ins. Co.*, 4 Cliff. 598, Fed. Cas. No. 12,715; *Equitable Life Assur. Soc. v. Nixon*, 81 Fed. 796, 26 C. C. A. 620; *Equitable Life Assur. Soc. v. Trimble*, 83 Fed. 85, 27 C. C. A. 404; *Whitcomb v. Phoenix Mut. Life Ins. Co.*, 8 Reporter, 642, Fed. Cas. No. 17,530. Thus it has been held that if, by the terms of a policy of insurance issued to a citizen of one state, it is made payable at the home office of the insurer in another state, and all premiums are payable there and no provision is made for any act to be done elsewhere by the company, it is governed by the laws of the state where the policy issued, though delivered by the local agent of the foreign insurance company at the place where the insured resides in another state: *Metropolitan Life Ins. Co. v. Bradley* (Tex. Civ. App.), 79 S. W. 367. It has also been held that a policy of life insurance issued to a resident of one state and providing that the premiums were to be paid at the insurer's off

in another state where payment of the insurance is also to be made and signed at the insurer's home office, is a contract made in that state and governed by the laws thereof, though it is to take effect only on delivery to the insured: *Summitt v. United States Life Ins. Co.*, 123 Iowa, 681, 99 N. W. 563. The same conclusion has been reached under like policies although it appeared that the first premium accompanied the application, and was received by the insurer before it issued the policy and mailed it to the local agent for delivery: *Equitable Life Assur. Soc. v. Nixon*, 81 Fed. 796, 26 C. C. A. 620; *Equitable Life Assur. Soc. v. Trimble*, 83 Fed. 85, 27 C. C. A. 404. In *Shattuck v. Mutual Life Ins. Co.*, 4 Cliff. 598, 608, Fed. Cas. No. 12,715, it was said: "Contracts of insurance are completed when the proposals of the one party have been accepted by the other by some appropriate act signifying such an acceptance, and it follows from that rule that the place or seat of the contract is the place where it was accepted. Consequently, if an agent appointed in a state other than that which chartered the company, and in which the company has its home office, forwards the requisite papers to that office and a policy is thereupon executed there, and mailed directly to the applicant, the contract is a contract made in the state where the home office is situated, and since the acceptance of the proposals is the test of completion, it follows that a transmission of the policy by mail to the agent to be delivered by him to the applicant, if the policy conforms in all respects to the proposals, would have a like effect, unless by the terms of the policy, it was not to be binding until some further act was done by the agent."

It would seem, therefore, that these cases make the acceptance of the application at the home office of the company, manifested by the issuance of the policy and sending it by mail to the insured at his place of residence through the local agent there, the last act essential to the completion of the contract, and they in effect deny that the delivery of the policy, the payment of the first premium to the agent, or notice of the acceptance of the application, is an implied condition precedent, the place of the performance of which determines the place where the contract is made, and under whose laws it must be construed.

STATE v. FOLEY.

[113 La. 52, 36 South, 585.]

EVIDENCE.—The Question of Res Gestae must be determined according to the circumstances of the case. (p. 493.)

EVIDENCE—Res Gestae.—To Render Declarations Admissible as part of the res gestae it is not necessary that they be concurrent; it is enough that they exclude all appearance or idea of design. (p. 495.)

EVIDENCE—Res Gestae.—The Statements of a Decedent are Admissible as part of the res gestae if made so soon after a homicidal act committed on him as to exclude all idea that they were made with a view of fixing the act on the defendant or to assist in his arrest. (p. 496.)

EVIDENCE—Res Gestae—Declarations of Injured Person.—Where police officers, hearing a shot, ran about four hundred feet and there found a person lying in the gutter, writhing in pain caused by a gunshot wound, who, being asked by them who shot him, answered, "Foley shot me without cause or provocation," such answer was held admissible in evidence on the trial of the person named for the murder of the person so shot. (pp. 498, 499.)

Joseph Edward Generelly and Warren Doyle, for the appellant.

Walter Guion, attorney general, Chandler Clement Luzenberg, district attorney, and Samuel A. Montgomery, assistant district attorney, for the state.

⁵³ BREAUX, C. J. The defendant was charged with murder by taking the life of Richard Flynn on the seventh day of April, 1902. He was tried, and found guilty as charged, on the sixteenth day of December, 1903. From the verdict of the jury finding him guilty as charged, and from the sentence of the court condemning him to suffer the penalty of death, he appeals to this court. The learned counsel for defendant having made the question res gestae vel non the ground of defense, and, in consequence, the ground to be specially reviewed on appeal, we take up that issue. Both the prosecuting officer and the counsel for defendant agree in the statement sustained by the jurisprudence of this court, that the question of res gestae must be determined according to the circumstances of each case.

We gather from the transcript that on the night of the shooting which resulted in the death of Flynn the two police officers who were near the locality of the shooting heard shots and saw them fired, and after the first two shots which were fired—or immediately following the other—they ran to the place ^{where}

the shooting occurred, and to the place where the wounded man lay. To quote from the narrative of the bill of exceptions: 54 "The witness saw the entire affray, from the moment that the first flash was seen, and up to the time that he reached the wounded man no one had reached the scene." They were four hundred feet away when they saw the light of the shots. The testimony is that it took them ten or fourteen seconds to run over the ground—evidently an exaggeration, as they could not run the distance in so short a time. The statement of the witness regarding this fast running ceases to be absurd only when it is considered, as we infer, that this witness (one of the two officers in question who came up after the shooting) desired to convey the idea that no time was lost in running from where they were standing to the spot of the shooting. They found deceased in the gutter, alongside of the curb. It was at that time that the witness, one of the officers before referred to, asked him who shot him. The answer of the deceased was, "Foley shot me without cause or provocation."

It was to this statement of the deceased that the defendant, through counsel, reserved a bill of exceptions, which brings up the point before us for decision. The court admitted the said declaration of the deceased as part of the *res gestae*. The trial judge adds the following to his narrative in the bill of exception, which we quote a second time for the sake of connecting statements: "The witness saw the entire affray from the moment that the first flash was seen, and up to the time that he reached the wounded man no one had reached the scene."

The defense lays some stress upon the form of the answer of the witness. We, for that reason, insert the testimony on the point in the words of the witness:

"Q. When you ran to this man, did you stop and ask him immediately about his condition? A. Yes, sir.

"Q. Did you ask him, when he was lying down, who shot him right then? A. Yes, sir, when I went there I tried to *grind* out who it was. I tried to find out who shot him. [*Italics ours.*]

55 "Q. As soon as you reached him you began to ask him questions right at once? A. Yes, sir."

The contention on the part of the defense is that the statement of the witness was not coincident with the shooting or immediately after. It was not coincident with the shooting it

2. The question arises whether it was immediately after to consider it a part of the *res gestae*. Only a brief

period of time had elapsed, and nothing we infer had been said, after the shooting, to the moment the officers came to where the deceased was in the gutter.

In view of the gravity of the penalty, we would readily adopt the view, followed in certain jurisdictions, that the declaration must be coexistent with the act, or so near that the intervening time is almost imperceptible; but our court, as we read the decisions, holds differently, and, of course, that which our jurisprudence held to be law yesterday must be held to be law to-day, unless there was manifest error committed.

Thus, in *State v. Thomas*, 30 La. Ann. 602, the court said: "It is not necessary that the declarations be concurrent; it is enough if they exclude all appearance or idea of design."

The decision in *State v. Revells*, 34 La. Ann. 383, 44 Am. Rep. 436, is very similar. The witness in that case heard the shot and the cry of the deceased, hurried to the spot, came to it about two minutes after the shooting, and it was then that deceased made statements "touching the person who had shot him." The accused was not present. This testimony was admitted as part of the *res gestae*.

In *State v. Molisse*, 38 La. Ann. 383, 58 Am. Rep. 181, the court said: "If the acts or declarations are unconsciously associated with and related to the homicidal deed, even though separated from it by a short time, they are evidence of the character of the deed and a part of the *res gestae*." ⁵⁶ This is an extreme case—as many as ten minutes had elapsed after the fatal shot—and yet the court held that the testimony was admissible as part of the *res gestae*, because the homicidal act was sufficiently connected with the statement "to be an immediate concomitant of it." We must say here we do not go that far in the case before us for decision. The learned court in that case stated: "And this is what Greenleaf means when he says, 'The trial judge must determine the admissibility of the evidence, and a large discretion is allowed him'; and the court even adds that, according to Greenleaf, the ruling of the trial judge thereon should be conclusive": Greenleaf on Evidence, sec. 108. To this decision we lend approval only to the extent that it may serve as analogy to the case in hand.

The court held in *State v. Harris*, 45 La. Ann. 844, 40 Am. St. Rep. 259, 13 South. 199, that when there are connecting circumstances they may, even when made some time afterward, form part of the *res gestae*, citing several decisions in support of its view upon the subject. The court approved the utter-

ance of the court of another state of this country, that the tendency of "recent adjudications" is to extend rather than to narrow the scope of the doctrine, and decided that a declaration not made at the place of the event, but a little over half a square away, under the facts circumstantially stated in the opinion, was admissible as part of the *res gestae*: *State v. Harris*, 45 La. Ann. 844, 40 Am. St. Rep. 259, 13 South. 199.

We have been at pains to examine each of the decisions to which we have referred, and, as we read them, in each case the statement constituting *res gestae* was held admissible when made at a time so near the act as reasonably to preclude all idea of design. While we are not inclined to go as far as was held in some of the cited cases, we ⁵⁷ think we find in each enough to preclude the possibility on our part of retracing our steps and of holding that the statement, to be admissible as *res gestae*, must be concurrent with the act.

In all these cases there was intervening time between the statement and the act. It is true it was found that the statement and the act closely following were connected, under circumstances, however, not more evident, as to concomitance of the act and the statement, than in the case at bar.

The commentators upon the subject have not interpreted jurisprudence differently from the views in the decisions to which we have just referred. They concur substantially in saying that the statement of the deceased is admissible, provided it is made so soon afterward as to exclude all idea that it was made with the view of fixing the act on the defendant or of assisting in his arrest. Wharton's Criminal Evidence, section 263, Bishop's New Criminal Procedure, section 1086, and Bradner on Evidence, 494, agree. Deliberate design *vel non* is the test.

Here we have not found deliberate design in the answer of deceased, who, while writhing in pain, lying prone in the gutter, as we understand, said: "Foley shot me without cause or provocation." Nor was there anything in this answer suggestive of the desire to give information that might lead to defendant's arrest. It was, we take it, the natural utterance of a gravely wounded man.

After a careful review of the decisions to which learned counsel for the defense invited our attention, we did not leave the subject impressed with the idea that the decisions were as far apart from those we have just reviewed as they at first appear. In nearly every one of these cases the predicate was a statement narrating the events, and the conclusion was reached that

the declaration ⁵⁸ was not part of the *res gestae*. On the way from premise to conclusion there are expressions, properly, we think, holding that the declaration, to be admissible beyond all question, should be immediately after or in some way "concomitant" with or directly relative to the act itself. There must only a brief period intervene, and not the least design appear. We understand that this is in the main the trend of the authorities in question.

There is always some difference in the facts of a case. The similitude is not complete. There is no question but that the decisions cited by counsel for defendant have the appearance of being in point. The question is, Shall we, because of this, change the ruling of this court on the subject?

In one of the cases cited, the court said: "But it is well settled in this state that, to make such matter admissible, it must have been concurrent with the act or transaction in issue, and a part of it, and that a narrative of a transaction completed and finished when the narrative is given, though made while fresh in memory, and so soon after that the party had not time, probably, to imagine or concoct a false account, is inadmissible": *State v. Carlton*, 48 Vt. 643.

In that case the court sums up the facts on this point with the statement that the declaration offered as part of the *res gestae* was no part of the act or transaction from which the death resulted; "that it was finished and ended some time previous to the making of the declaration, and it was not so connected with any part of the act or transaction as to make it admissible."

In the case before us for decision the police officers ran to where the deceased was, and were near him and heard the declaration before anyone came up. In the second case cited by defendant's counsel, that of *People v. Ah Lee*, 60 Cal. 90, the court says: "That in the admission of testimony of this character much would have to be left to the exercise of the sound discretion of the judge at the trial."

⁵⁹ The court said on the merits of the question: "In the case now before us it does not appear that anything occurred between the defendants and the deceased after the stabbing, and yet the prosecution was permitted to ask the witness what he heard either of the parties say at the time of the stabbing or immediately after. In response to it the witness might have stated what was said by the injured party after the assailant had fled and he himself had reached a place of safety. Ar


such appears to have been the construction which the witness, court, and counsel placed upon the question. The statement to what the witness testified related to an act which had been completed, and the statement was clearly made with a view to the apprehension of the offenders."

We do not infer that anyone is of the impression in the case before us that the declaration of the deceased was directed toward enabling the police to apprehend the offender. That theory has not been suggested, and we must say that we have not been led to such an inference by reading the testimony which comes to us with the transcript.

The other decision cited, *People v. Wong* Ark, 96 Cal. 128, 30 Pac. 1115, is very much to the same effect, and adds emphasis to the rule that the declaration must be of facts talking through the party. It all comes to the idea, expressed in other words, that *res gestae* is not admissible when it is not part of anything done or something said while something was being done, but is something said after something done, as clearly expressed in *Regina v. Redingfield*, 14 Cox, 341 (English case), which goes further in excluding such declarations than the courts of this country. Cockburn, C. J., in the cited case, says: "I regret that, according to the law of England, any statement made by the deceased should not be admissible." Here the same rule prevails, except when the words are prompted by the suffering endured and while writhing with pain, immediately after; when it is, as it were, the voice of the wound inflicted that speaks.

We leave the decisions cited by counsel for defendant, to say that reliance is placed by the defense on the decision in the case of ⁶⁰ *State v. Charles* (decided in February last, No. 15,098) 111 La. 933, 36 South. 29, in which the statement of the deceased to his attending physician was held inadmissible, under circumstances which showed that there was deliberation on the part of the physician at least, who came to where the wounded man was, not a minute or two after the shooting, but nine or ten minutes, and said in substance that he wished to know, before beginning with the case and making attempt at relieving the pains of the fatally wounded man, "who did the shooting." The question was pregnant with a suggestion that some one must be named as the guilty party.

There was nothing of the kind in the case here, unless the word "grind," which we have before italicized, can give rise an inference of impropriety on the part of the public officer.



The word seems barren of meaning, used as it was. It may be that it was, as suggested by the district attorney at bar, that, owing to a stenographic error, the word "find" was changed to "grind." We have not found that this "grind" was connected with any question asked, or with anything which took place, while the police officers were standing near the deceased.

The declaration of the deceased that he was shot without cause or provocation is part of a natural impulse. The wounded man who feels that he has been wronged and injured will nearly always immediately give vent to the expression that he did not provoke the act. At any rate, we do not think that there was anything in the words showing a desire for revenge. One can impulsively declare that he is innocent without seeking thereby to injure, or to have his assailant arrested and punished. We have found no ground upon which to reverse the verdict and sentence.

Only one alternative remains, and to it we have arrived only after having carefully considered each of the decisions of this court before mentioned. ⁶¹ We are constrained, in our view of the law and jurisprudence, to affirm the verdict and sentence and judgment.

For these reasons, the judgment appealed from is affirmed.

The Question of Res Gestae is discussed in the monographic note to *People v. Vernon*, 95 Am. Dec. 51-76. No fixed time or distance from the main occurrence can be established as a rule to determine what shall be a part of the *res gestae*: *Keefer v. Pacific Mut. Life Ins. Co.*, 201 Pa. St. 448, 88 Am. St. Rep. 822. In fact, time is not necessarily a controlling element or principle in the matter: *Coffin v. Bradbury*, 8 Idaho, 770, 95 Am. St. Rep. 37; *Honeycutt v. State*, 42 Tex. Cr. Rep. 129, 96 Am. St. Rep. 797. Generally speaking, however, declarations, to be admissible as part of the *res gestae*, must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations: *State v. McDaniel*, 68 S. C. 304, 102 Am. St. Rep. 661; *Elder v. State*, 69 Ark. 648, 86 Am. St. Rep. 220, and see the cases cited in the cross-reference note thereto. Declarations which amount to a mere narrative in regard to a transaction already passed are usually not admissible: *Baier v. Selke*, 211 Ill. 512, 103 Am. St. Rep. 208. Yet declarations cannot be excluded simply on the ground that they are in the form of a narrative, and made in answer to a question: *Murray v. Boston etc. R. R.*, 72 N. H. 32, 101 Am. St. Rep. 660.

CRICHTON v. WEBB PRESS COMPANY.

[113 La. 167, 36 South. 926.]

CORPORATIONS—Stockholders, When Subject to the Same Limitations as Directors.—If, in any particular case, stockholders have authority to manage the affairs of a corporation—in other words, to discharge the functions of directors, and undertake to do so—they, for all the purposes of the affairs thus managed, become directors in effect, and occupy, for the purposes of such affairs, the same relation of trust which directors ordinarily hold toward the corporation. (p. 511.)

CORPORATIONS—Directors and Stockholders, Power of to Contract With and for Themselves.—The holders of a majority of stock in a corporation, who are also its directors, cannot be the final judges in their own case and vote to themselves the money of the corporation over the objection and protest of the other stockholders. Their decision of all questions where their personal interest comes in conflict with that of the corporation is subject to review by a court of equity at the suit of the objecting stockholders. (p. 512.)

CORPORATIONS—Dividends, Power of the Courts to Compel. A court of equity may compel the declaration of a dividend at the suit of the minority stockholders of a corporation. (p. 512.)

CORPORATIONS—Retroactive Fixing of Salaries.—The directors of a corporation, who also are a majority of its stockholders, cannot by resolution increase their salaries and give such increase a retroactive effect. (p. 513.)

CORPORATIONS—Revising Contracts and Acts of for the Purpose of Declaring Just Dividends.—Where the directors of a corporation owning a majority of its stock proceed to carry on business and to contract with themselves against the objections of the minority, a court of equity, at the instance of such minority, must deal with the situation in so far as it is an accomplished fact and compel the declaration of such dividends as it finds equitable under the circumstances, though, in doing so, it must revise the basis of the profits of the business as fixed by such majority directors. (p. 518.)

Lynn Kyle Watkins and Wise, Randolph & Rendall, for the appellee.

Sutherlin & Barrett, Stewart & Stewart and Alexander & Wilkinson, for the appellants.

103 PROVOSTY, J. This suit is brought by two minority stockholders to compel the defendant corporation to declare a dividend. Incidentally, and in order to increase the dividend, the further relief is prayed that certain allowances of salary and certain contracts allowed and made by the majority to and with themselves be annulled. The individuals composing the majority are made parties defendant, together with the corporation. The history of the case is this:

In May, 1895, the two brothers, Samuel J. and Robert D. Webb, obtained a patent for a cotton compress of the invention of S. J. Webb. They valued it at \$50,000. Not having command of the capital or credit required to put the invention to an actual test by building one of the compresses and putting it in operation, they offered to sell a half interest in the patent to one of the plaintiffs and certain other parties. The latter preferred an arrangement by which they should go security for the Webbs for the building of the press, and in consideration thereof should have an option to buy within a limited time. This was done and the press was built. It proved successful; but the option was permitted to run out without having been availed of—why, is not explained. After the option had expired, the two Webbs sold to the two plaintiffs, Thomas and James Crichton, a sixteen per cent interest in the patent for \$8,000. The Webbs and the Crichtons then proceeded to exploit the patent by launching a business of compress building, under the firm name of S. J. Webb & Bro. The venture proved in a high degree successful. In the very first year, 1895, a net profit of \$16,942.26 was ¹⁶⁹ realized. It was then deemed advisable to organize a corporation to carry on the business, and this was accordingly done. The date of the incorporation was the 2d of January, 1896. The incorporators were the same parties who were owners of the patent, with the addition of J. Y. Webb, a nephew of S. J. and R. D. Webb, who took one share. The name of the corporation was S. J. Webb Company, Limited. Its capital stock was fixed at \$100,000, divided into shares of \$100. The entire stock was subscribed by the incorporators, owners of the patent, and in the same proportion in which they were owners, except, as already stated, that one share was taken by J. Y. Webb. It may be as well to mention here that the parties continued thereafter to hold the stock in the same proportion—that is to say, as follows: Thomas Crichton, ten shares; James E. Crichton, six shares; R. D. Webb, twenty shares; S. J. Webb, sixty-three shares; and J. Y. Webb, one share—and that they so hold it up to the present time. It may also be mentioned here that shortly thereafter J. Y. Webb acquired an interest in the patent corresponding with his interest in the corporation; that is to say, a one per cent interest.

While the immediate purpose of the organization was to exploit this patent, the scope of the corporation was not so limited, but was made more comprehensive, the language of the charter being as follows: "That the purpose and object of this

poration is to buy, sell, build, erect, operate, lease, or rent out compresses or compress machinery under such patent rights as this company may buy, lease, or acquire the agency of, or use and own in its own corporate right, and to procure, own, manufacture, or cause to be manufactured or be made such machinery as may be necessary or useful for carrying out the purposes stated, and to own such necessary warehouses, tools, equipments, lands, and property, real and personal, for the furtherance of the business of the corporation."

The charter provided that the stockholders should meet at the office of the company on the first Monday of January of each year without special call; that postponed and called ¹⁷⁰ meetings of the stockholders could be held on due notice by the president, setting forth the object of the meeting. The charter also provided that a board of directors, to consist of five stockholders, three of whom should constitute a quorum, should be elected at the regular meeting on the first Monday of January of each year; the first board, however, to be composed of the five incorporators, viz., S. J., R. D., and J. Y. Webb, and Thomas and James Crichton, who should hold office until their successors were elected and had qualified. The charter further provided that the board of directors should conduct the business and affairs of the company, and elect the officers of the company, and fix their salaries, and should prescribe the powers and duties of the officers, with the condition, however, that their said acts in respect to the powers and duties and salaries of the officers should be subject to ratification by the stockholders. The officers were to be a president, a vice-president, a secretary, and a treasurer, and such other officers as the board of directors might deem necessary to conduct the business of the company.

On the day of the organization, January 2, 1896, the board of directors met and elected the following officers: S. J. Webb, President; Thomas Crichton, Vice-President and Treasurer; R. D. Webb, Secretary—and adopted resolutions to the following effect: 1. A resolution leasing the compress patent from the owners thereof. That is to say, the two Webbs, S. J. and R. D., and the two Crichtons, leased the patent to the corporation, whereof they themselves held the entire stock, except the one share held by J. Y. Webb. The rental was fixed at \$5,000 for each compress the company should sell or build, or cause to be sold or built, and \$1,000 for each "movement" the company should put, or cause to be put, into a Morse or any other com-

press; payment to be made upon erection of the machinery. 2. A resolution authorizing the president ¹⁷¹ and the secretary to make and sign all contracts for the company. 3. A resolution accepting the proposition of S. J. Webb to work for the company during the year 1896 for \$150 a month, "reserving to himself the right to all new inventions or improvements of whatsoever nature he may make." 4. A resolution to the effect that S. J. and R. D. Webb "should have all the profits on any press of their patent in Cleburne, Texas."

On the next day, a meeting of the stockholders was held, and all the proceedings of the meeting of the board of directors of the preceding day were approved and ratified. J. Y. Webb was not at that time a part owner of the patent, but, as already stated, he afterward acquired an interest in it corresponding with his interest in the corporation; that is to say, a one per cent interest. The necessity of such an interest being transferred to him in the patent arose from the fact that the agreement to pay \$5,000 per press to the owners of the patent was not intended by the parties to be carried out, but was a mere convenient arrangement for transferring the net profits of the company, which would approximately be of that amount per press, from the company to the owners of the patent; in other words, from the stockholders as stockholders to themselves as individuals. As shall be seen presently, the profits of the company on the 90-inch press soon fell below \$5,000 per press, so that, if that contract had been genuine, the company would soon have had to retire from it, which it had the right to do at any time under the terms of the contract, unless it chose to run with the certainty of a loss.

No other meeting, either of stockholders or of directors, seems to have taken place until the 30th of November of the same year, 1896, when there was a meeting of stockholders. S. J. and R. D. Webb had ¹⁷² in the meantime attended to the business of the company and with brilliant success. At that meeting resolutions were adopted to the following effect: 1. A resolution changing the name of the corporation to that of Webb Press Company, Limited, the charter and business of the company to remain unchanged and unaffected. 2. A resolution transferring to the corporation the assets of the partnership of S. J. Webb & Bro., by which the business had been conducted previous to the organization of the corporation. 3. A resolution levying an assessment upon the stockholders in proportion to their holding, so as to produce a sum of \$5,000, each

stockholder to furnish for his share of the assessment his note falling due March 1, 1897.

The stockholders did not meet again until the 29th of January, 1901, which meeting was very important, and will be duly noticed. The only meetings of the board of directors were in February, March, and December, 1898. At these meetings, the following resolutions were adopted: 1. A resolution ratifying certain contracts entered into by the president and the secretary of the company. 2. A resolution fixing at \$3,700 and \$3,000, respectively, the salaries of S. J. and R. D. Webb, "reserving all inventions or discoveries to themselves, same as if not employed by the company." 3. A resolution authorizing S. J. Webb "to place new presses as he thought best."

The regular stockholders' meetings of January, 1897, 1898, 1899, 1900, and 1901, were not held, owing to the absence of a majority of the stock; i. e., of S. J. Webb, or of the stock held by him. During all this time the affairs of the company under the management of S. J. and R. D. Webb continued highly prosperous. During this same time S. J. Webb had ¹⁷⁸ made numerous improvements to the compress, and had utilized them in the business of the company; and finally he had invented what he considered to be a new compress, known in this case as the "80-inch press," to distinguish it from the patented press, known as the "90-inch press." Out of these inventions, or as a result of them, have grown, in the main, the differences between the parties, who have been unable to agree what amount, if any, the Webbs should charge the corporation for the use of their inventions.

Some of the improvements were put on in the very first year of the company's business; that is to say, in 1896. Others were added as made. The Crichtons would not admit that the use of these improvements was beneficial to the company, nor that the charges made for them by the Webbs were reasonable; but the Webbs had the business of the company in hand, and went on using the improvements, and the questions of the right to use them and of the proper amount to charge for their use remained open.

In 1899 the Webbs solicited and obtained the consent of the Crichtons that the company should build one of the 80-inch presses as an experiment, the Webbs agreeing to hold the company harmless against any loss. The result proved highly satisfactory, and demonstrated the superiority of the 80-inch press over the 90-inch.

The record does not show at what time of the year 1899 the first 80-inch press was built, but by the 1st of January, 1900, the time for the regular meeting of the stockholders, three 80-inch presses had been built; and it had become evident to the Webbs, who had entire and exclusive charge of the company's business, that the 80-inch press would have to supersede the 90-inch entirely. In fact, after the trial and demonstrated success of the 80-inch press, the company built only one 90-inch press, and the record does not show whether the contract¹⁷⁴ for it had not been entered into previously.

The invention of this new press brought an unforeseen complication in the business of the company. The Crichtons were part owners of the 90-inch patent, for the lease of which the company was under contract to pay \$5,000 per press, and they owned no interest in the new invention; and naturally the Webbs, owners of the new invention, wanted to be paid for the use of it. They had not yet obtained a patent, and did not obtain one until December 16, 1902, seven months after the institution of this suit, which was filed May 3, 1902; but, all the same, the thing was theirs, and they were not disposed to let the company have the use of it without payment. They demanded the same rental which the company was under contract to pay for the use of the 90-inch patent. The Crichtons insisted that the 90-inch patent was a good press, which had practically driven all competitors from the field, and that the company should go on using it. They objected to the use of the 80-inch invention, and especially objected to paying so large a rental. The Webbs, on their side, insisted that the 80-inch press was a better press in every way, stronger, safer, and cheaper, and that if it was not adopted by the company they would have to dispose of it to others, and that it would easily drive the 90-inch press out of the market; and we may mention here that the testimony leaves no doubt that such was the fact. Also, we may say here, as well as later, that their right to exact payment for the use of their invention cannot be doubted. It was theirs, and, of course, they could exact payment for the use of it. Not only there is nothing in the patent law that could prevent their doing so, but section 4899 of the Revised Statutes of the United States [U. S. Comp. Stats. 1901, p. 3387], impliedly recognizes a right of ownership in an unpatented invention.

The net profits on the three 80-inch presses¹⁷⁵ erected in 1899, after deduction of the \$15,000 rental to the Webbs and the proportionate share of these three presses in the gene

expenses of the company, such as salaries, etc., was \$3. The net profits on the six 90-inch presses erected in the year, after deduction of \$6,000 for royalties on improvement and the proportionate share of these six presses in the expenses of the company, such as salaries, etc., was \$21.

It is thus seen that the profits from the 80-inch press were very much larger; that the 80-inch press yielded a profit of \$1,126.88 per press, after deduction of \$5,000 per press of royalty, whereas the 90-inch press yielded a profit of \$3,563.54 per press after a deduction of only \$1,000 per press by way of royalty. So that, if the owners of the 90-inch press had held the company to the payment of the \$5,000 agreed to be paid for the lease of the patent, the company, by building the 90-inch presses, would have been operating at a net profit of \$1,436.46 for every press it would have sold. The dispute between the parties, then, could not be, and was not, in connection with the relative merits of the two presses, nor in connection with the question as to which press it was to the best interest of the company, as a company, to adopt and advocate, but it was simply and solely in view of the fact that the Crichtons were part owners of the 90-inch press and had no interest in the 80-inch invention. That while the company, as a company, would lose \$1,126.88 per press by building the 90-inch presses, and per cent of \$1,126.88 per press by building the 80-inch press, the Crichtons) would individually gain more if the company adhered to the 90-inch pattern.

By the time the 1st of January, 1900, came around the regular annual meeting of the stockholders should have taken place, the question of using the 80-inch press in the future of the company and what charge should be made for its use had reached the acute stage. ¹⁷⁶ Unfortunately S. J. Webb, the main party in interest, was absent, and no final agreement could be arrived at in the matter. All that could be done was to adopt a modus vivendi until his return. He was to return by March 1st; that is to say, in two months. It was agreed that the Crichtons should then be let out of the company and that a full and final settlement of the 90-inch press business should be made. In the meantime the company should go on selling and advocating the sale of both presses, and the business of the presses be kept separate on the books as far as possible, and the Webb take all the profits of the 80-inch press business.

But S. J. Webb did not return by the 1st of March, nor until the following January, being busy at the time in connection with seeing to the construction of presses and traveling o

country selling presses. During the year 1900, owing to sharp competition, the profits of the company on the 80-inch press business had fallen below \$5,000 per press, so that there could no longer be any question of paying to the Webbs that amount per press for the use of their invention, and the necessity of arriving at some definite and final agreement in the matter had become all the more imperative.

The regular meeting of the stockholders of January 1, 1901, failed for the same cause which had prevented the meeting of the previous January—the absence of S. J. Webb. But a meeting was called for January 29, 1901, and the Crichtons were duly notified to attend. Knowing, however, what business it was proposed to bring up before the meeting, and also knowing that they would be outvoted by the Webbs, they stayed away. The meeting took place without them. Important matters were voted on, but not the question of superseding the 90-inch press by the 80-inch press in the business of the company. That question was left for a subsequent meeting, which was called for the 9th of February, and the Crichtons were again duly notified ¹⁷⁷ to attend. The meeting was duly held, and again the Crichtons kept away.

At the first of these meetings, that of January 29th, the following resolutions were adopted: 1. A resolution directing that the certificates of stock to which each stockholder was entitled be issued to him. 2. A resolution approving and directing the secretary to pay an account of J. S. Webb for \$6,821.30, without stating what the account was for; also, an account of S. J. Webb & Bro. of \$520, for tools, tackle, etc., and \$7,000 “for profit made on the press sold in Cleburne, Texas.” 3. A resolution approving, and directing the secretary to pay, the account of S. J. Webb & Bro. of \$26,000 for royalties for use of improvements in twenty-three 90-inch presses. 4. A resolution approving, and directing the secretary to pay, the account of S. J. Webb & Bro. of \$15,000 for royalties on three 80-inch presses erected in 1899.

At the meeting of February 9th the following resolutions were adopted: 1. A resolution reading as follows: “The question of the company selling, building, using, and making contracts for the 80-inch compresses and other inventions and improvements other than presses covered by United States patent 539,496, issued May 21, 1895 (the 90-inch press patent) was discussed. It was unanimously voted to continue this year selling, building, using, and making contracts for the 80-inch

and other inventions and improvements, and pay to S. J. Webb & Bro. all the profits made from this part of the business of the company." 2. A resolution reading as follows: "Resolved, that S. J. Webb & Bro. be and they are unanimously resolved to pay S. J. Webb & Bro. all the profits of the business of the year 1900, last year, that accrued from selling, building, using, and making contracts for the compress and other inventions and improvements, except those covered by the United States patent 539,496 (compress press) issued May 21, 1895, to S. J. and R. D. Webb, and pay to the owners of the latter patent all the profits that shall accrue from selling, building, using, and making contracts for compresses under same." 3. A resolution disposing of all matters of business detail, as to which there was, and there could be, no dispute.

¹⁷⁸ By these resolutions the Webbs, holding a majority of the stock, decided in their own favor every issue between them and the Crichtons. Anticipating such a result, and fearing that there would no longer be any profits for them, the Crichtons had asked to be let out of the company upon a settlement which would leave out of computation the amounts claimed by the Webbs for royalties on their improvements and for the use of the 80-inch invention, which amounts the Webbs, managers of the company, had caused to be charged up against the company on the books. The Webbs were willing to let the Crichtons retire from the company, but they insisted that a settlement should be made according to the books of the company, that is to say, including the disputed charges. They were willing, in addition, to allow the Crichtons \$1,200 for their interest in the discredited 90-inch patent. In the alternative, they were willing to sell to the Crichtons an interest in the 80-inch invention corresponding with that which they had in the 90-inch patent. They fixed the price at the same, \$50,000 at which the 90-inch patent had been valued. This would have removed the bone of contention and ended the controversy. The Crichtons refused to buy such an interest, signing as their reason that they would have no assurance that S. J. Webb would not produce some new invention to which the 80-inch press, which, in turn, they would have to use, would be so on ad infinitum.

Not succeeding in obtaining an amicable settlement, the Crichtons brought a suit for the appointment of a receiver to manage the affairs of the company. That suit was granted on October 26, 1901. The petitioners alleged that the

enormous and exorbitant salaries to each other, and voted
 over to S. J. Webb and to Webb & Bro. large sums of
 by way of royalties for the use of so-called improve-
 which allowances were unauthorized and unjustifiable
 er the charter, but were grossly excessive, and that all
 s done for the sole purpose of absorbing the revenues
 company and defrauding the petitioners.

alleged, further, that the Webbs were holders of a ma-
 f the stock of the company, and had the management of
 rs entirely in their own hands, as well as all the funds
 company, and were so conducting the business of the
 y as to divert to themselves all the profits of the com-
 which were large, and so as to defraud the petitioners
 rights, all of which amounted to gross mismanagement
 affairs of the company and made the appointment of a
 necessary.

Webbs denied these allegations, and averred that they
 anaged the affairs of the company well, and with the
 and approval of the plaintiffs, and in accordance with
 rter, and finally averred as follows: "Your respondents
 at there is no necessity for a receiver to be appointed,
 at the complainants have legal recourse in other ways,
 l means are necessary for settlement, which your re-
 nts deny and aver that, if a receiver is appointed, it will
 e business of the company and prostrate the most flourish-
 mpress corporation in the world, and destroy assets of
 value to your respondents, without any benefit to the
 ffs."

t suit resulted in a judgment in favor of defendants.
 aintiffs appealed to this court, but the appeal was dis-
 for informalities. That was in February, 1902.

present suit was filed May 3, 1902. As already stated,
 or a dividend, and incidentally for a settlement of the
 of the corporation up to date, with a view to ascertain-
 at the amount of this dividend should be, and also for
 nulment of certain contracts made by the majority with
 lves, and also of certain allowances of expense accounts
 aries and royalties by the majority to themselves.

allegations are virtually the same as ¹⁸⁰ in the suit for
 ointment of the receiver. The nullity of the allowances
 ned on the ground that the majority could not vote to
 ves the property of the company, or could not make
 ts with themselves to the detriment of the compan'

Exceptions were filed to the form of the proceeding, but are not now insisted on, the defendants seeming to be of the opinion that the court should, as far as possible, pass upon the merits of the controversy.

The Webbs, as a matter of course, deny that the salaries of salary are too large, or that the charges for royalties for the use of the improvements and of the new 80-inch press are excessive; and they insist that the action of the shareholders at the meetings of January 29, and February 1, 1891, is conclusive, and that the Crichtons have neither in fact any ground of complaint. They contend that the Crichtons consented to the arrangement by which all the profits of the company arising from the exploitation of the 80-inch press, or of the other inventions or improvements, shall be paid to them (the Webbs), and they contend that up to the present time the Crichtons had made no claim to participate in these profits.

At the request of the plaintiffs, the court appointed an auditor to make a statement of the financial position of the company as appearing on the books. The report of these expenses is on the record, and is conceded to be a correct statement of the books. The disputed items, having been charged upon the books, are included in the report, and affect its totals and balances, so that, if any of them are rejected, the figures will have to be recast.

Under these facts and under the pleadings the questions for decision are, first, as to whether the court should order a dividend; second, in case a dividend is ordered, what should be the amount thereof; third, as to ¹⁸⁹¹ the salaries of the Webbs for managing the affairs of the company; fourth, as to their expenses; fifth, as to what amount should be allowed to the Crichtons for royalties on the improvements to the 90-inch press; sixth, as to the resolution allowing S. J. and R. D. Webb \$5000 for the press on the three 80-inch presses erected in 1899; seventh, as to whether they should be allowed to take their share of the profits of the business of the 80-inch press, and, if not, to what extent they should be allowed for the use of their investments.

Preliminary to taking up the discussion of these matters, it is necessary to dispose of the contention of the defendants that these points have already been finally decided by the shareholders. The authorities. That contention is evidently without force. A person cannot be judge in his own case, cannot be a party to a contract, cannot vote to himself the money

iates in a corporation. Defendants admit that this is the case of a director, but contend that it is not so in the case of a stockholder, because the same trust relation which exists between a director and the corporation in which he is precluded from acting for the corporation in any case in which his interest is adverse to that of the company, does not exist between the stockholder and the company. Undoubtedly, no trust relation ordinarily exists between the stockholder and the corporation; but the reason is that ordinarily the stockholder is a stranger to the management of the affairs of the corporation, which is the province of the directors. If, in any particular case the stockholders have authority to manage the affairs of the corporation—in other words, to perform the functions of directors, and undertake to do so—all the purposes of the affairs thus managed, become, in fact, and occupy, for the purposes of such affairs, the ¹⁸² same relation of trust which directors ordinarily have toward the corporation. This trust relation is not a matter of statutory law, or of technical law, but is simply the consequence of the impossibility of being judge in one's own case, or of being on both sides of a contract.

Therefore a question of no importance whether the stockholders of this company had, or had not, authority under the charter to manage the affairs of the company. The stockholders and directors were the same five persons, and it is a pertinent proposition that they could not assume, or divest themselves of, this trust relation toward the company as they change their coats. As a matter of fact, however, the stockholders did not have authority to manage the affairs of the company. It is a fundamental principle of the law of corporations that stockholders have no mandate to act for the corporation. 10 Cyc. 760; Cook on Corporations, 4th ed., p. 34.

A corporation whose affairs could be managed indifferently by its stockholders or by its directors would be a very odd and highly anomalous corporation. Of course, the charter might so provide; but no charter would be so drafted unless a construction more in consonance with the ordinary meaning of the words ordinarily obtains were impossible. In the present case the charter does contain a clause which, taken literally, expresses that idea; but the context of that clause shows that its purpose was merely to regulate the proportion of vote which should be required at the meetings of stockholders to decide the different questions with which the stockholders might

have to deal, and also, if taken literally, it would cover another clause, by which it is provided that the affairs of the company are to be conducted by the directors. However, the question, we repeat, is of no importance, since the more stockholders than as directors, could be final as to their own case, and vote to themselves the management of the corporation, over the objection and protest of their associates in the corporation.

In justice to the Messrs. Webb, we hasten to add that the implication of moral wrong attaching to the act of the directors in this case, inasmuch as they constituted a majority of the stockholders and the directors, and were sole managers of the affairs of the company, and therefore had to pass upon all questions pertaining to the business of the company, those in which they had a personal interest. Nevertheless, their decision on all questions where their personal interest came in conflict with that of the corporation was made final, and not to be reviewed by a court of equity at the suit of their co-associates, as in the present case.

Proceeding to adjudicate upon the disputed points, the court finds that a dividend should have been declared and should be ordered. The company began business with a cash capital of \$26,000 to which was added the notes of the stockholders for the amount of \$5,000. Its profits, according to the reports of the experts, amounted in November, 1902, to \$25,000. While the business of the company has increased very rapidly, and the actual cash in bank is very low, yet the court finds that a dividend of \$50,000 could be safely declared, and will so order.

The court finds that the general expenses, amounting to \$64.55, are charged in lump sums without detail of items. The court is morally convinced that the charges are legitimate, and there is no evidence of the fact beyond the charge. At this point the case will have to be remanded, with instructions to the lower court to require detailed accounts to be rendered, and with further instructions that unless, upon the production of these accounts are found to be grossly exaggerated, there will be no ground for interference by the court.

The royalties for the use of the improvements in the inch press are overwhelmingly shown to be just and reasonable, and the \$5,000 per press allowed on the presses erected in 1899 is not so far out of

ify the court in interfering with the action of the
rs. There was still left to the company a fair mar-
fit. The salaries as fixed are not too large, but the
fixing them can, as a matter of course, have opera-
for the future. There cannot be any retroactive in-
alary, or voting of back pay.

not think the Webbs have established their claim to
entire profits of the 80-inch press business. This
n the entire profits of the company from and after
strated success of this 80-inch invention in 1899;
fter, as we have stated, the company built only one
ess, and the building of presses was the company's
e of profit. R. D. Webb testifies, and counsel for
s says, that there were other profits; but what was,
ave been, their source we are not told. Counsel re-
tain exhibits in the record as showing \$14,000 of
ts; but, so far as we can see, these exhibits show only
ections the company has made on notes given for
d in previous years and what property it has on hand.
appear on these exhibits, we are not sufficiently skilled
eping to be able to distinguish them from among the
s. If the Webbs were permitted to take all the profits
inch press business, the situation would be that the
had been operating solely for their interest from and
beginning of 1900, barring what interest the Crich-
t have had in the liquidation of the 90-inch press
1895 Of course, the Crichtons might have made an
t to that effect; but we do not find that they did.

ly agreement which we find they made was the one
to at the meeting of January, 1900, to the effect that
ld be settled with on the return of S. J. Webb in the
March, and be let out of the company, and that in
time the company should exploit both presses, and all
s of the business of the 80-inch press go to the Webbs.
is agreement seems to have been permitted to stand
return of S. J. Webb in the following January; and
re the meeting of January 29, 1901, the Crichtons were
ing to retire from the company on a fair settlement,
no share in the profits of the 80-inch press business;
agreement was not in itself a settlement, or even a def-
unconditional agreement or contract, but merely a ten-
measure toward the settlement, a plan of settlement, and
ever carried out. Taking out of this agreement, as the

present contention of the Webbs would do, the prov settlement and a letting out of the company, and it self to the proposition that the Crichtons consented the pany should be operated for the sole and exclusive the Webbs, and they to get absolutely nothing in ret

We do not find that the Crichtons ever intended of that kind. Their idea was to be settled with and the company. As we read their conduct, it was that gent business men, recognizing the logic of the sit indisposed to make unnecessary trouble, but at the insisting upon the full measure of their substantial not relinquishing or waiving one iota thereof.

This situation was that this invention belonged to the Webbs, and the Webbs had adopted it into t of the company, and were fully resolved to continu it, and they had the power to do so, and for the use demanding \$5,000 per press, and not a cent less; say, something more than the total profits of the co press. So that it would be a mere question of keepi state of things long enough for all the accumulated the company, as well as all its original capital sto else it might possess, to pass to, and become the excl erty of the Webbs. Under this condition of affairs, tons had not much choice. It was either to be let company on a fair settlement of the 90-inch press l a lawsuit. As sensible men they chose the former hoped for it until at the meeting of February, 190 jority by formal resolution committed the compan business for the exclusive benefit of the Webbs; and had recourse to the other alternative, and institut ceivership suit.

If the Crichtons were consenting unconditionally a fiedly, as contended, to these profits going to the V not apparent why they kept away from the meeting ary, 9, 1901, where the resolution voting these pr Webbs was to be passed, and was actually passed. A disputed points had been settled at the meeting of Ja and this meeting of February 9th was for the purp tling this 80-inch press business, and of disposing of ters as to which there was no dispute. The very fa Webbs thought it necessary to pass this formal reso withstanding the absence of the Crichtons, shows th not consider that the matter had been finally settled

reement. The adoption of that resolution in the absence of the Crichtons means that the Webbs intended that the business should be settled and put at rest by force of a vote of the stockholders. So true is this that we find their counsel conceding before this court that ¹⁸⁷ the resolution did have that effect, there being no trust relation between the stockholders and the corporation, the Webbs could thus vote to themselves the profits of this 80-inch press business; and that in doing so was final and binding on the Crichtons. Proof of the agreement of the Crichtons to relinquish their right to participate in the profits of this 80-inch press business is shown by the fact that counsel for defendant points with great confidence to the testimony of the Crichtons in the receivership suit. Now, if the intention of the Crichtons to such participation was not unequivocal previous to that suit than it was in or by the testimony, the Webbs have little indeed to stand upon in their contention. The allegations of that suit were that the Webbs were managing the affairs of the company in their own interest, and that a receiver was necessary to manage the affairs of the company in the interest of all the stockholders; the prayer was that a receiver be appointed to manage the affairs of the company for the benefit of all the stockholders. There was not one word of disclaimer of the right to participate in the profits of the 80-inch press business. The complaint then been exploiting the 80-inch press exclusively for two years. The answer to the suit was that the appointment of a receiver was unnecessary, because the "affairs of the company were being conducted for the benefit, advantage, and interest of the stockholders, without preference or favor to any one of them" and that the appointment, of a receiver would "prostrate the most flourishing compress company in the world"; that is, that the company, as a company, was "the most flourishing compress company in the world," and was being administered for the benefit of all the stockholders without discrimination. Now, if the company, as a company, was taking no part in the profits of the business it was conducting, but the Webbs were taking them ¹⁸⁸ all, how could it, as a company, be "the most flourishing compress company in the world"? And if the Webbs were taking all the profits of this business, and the company was none of it, how could it be said that the company was being administered "for the benefit of the stockholders, without preference or favor to any one of them."

It is pending that suit that the resolution of January 17, 1887, was adopted, upon which, also, defendant's able counsel

places much reliance. That resolution reads, as follows: "Moved by Robert D. Webb, and seconded by J. E. Crichton that the company proceed at once to collect by law if necessary, the Bierce note for \$2,500, and interest thereon, it being fully understood and agreed that as this note is a part of the assets of the company (made before the date of this note) in which all the stockholders are interested, and that Bierce threatens to claim damages to amount of \$10,000 under contract with him, and if he should sustain his claim in toto or in part the said damages and expenses of said suits be paid out of said assets in which all the stockholders are interested. The motion unanimously adopted."

In our opinion, however significant that resolution might be if standing alone, it proves nothing against the Crichtons, when read in the light of the surrounding circumstances. Pending this receivership suit, the business of the corporation had to go on, and there was but one basis on which it could proceed, and that was the basis which the majority of the stockholders had established. The Crichtons were not bound to sulk in their tents, and refuse to participate in the business of the company. The resolution might have been worded more guardedly, but we do not think that it must necessarily be construed into approval by the Crichtons of a situation against which they were judicially protesting. It recognizes the existence of a certain state of things, but does not necessarily agree to, or approve, or ratify, it.

On the question of what amount the company should be required to pay to the Webbs for the use of this 80-inch invention, the court has hesitated long, realizing that it is a ¹⁸⁹ delicate thing to dictate to the owners of this invention what they shall have to accept for the use which the company has been making of it. They were unwilling to accept from the company less than \$5,000 per press, and now the court is compelling them to accept less. But, under the circumstances, no other course is open, since the other alternative would be that the Webbs would be left to decide their own case, to vote to themselves the money of the corporation—an alternative totally inadmissible.

In estimating this amount the court has not the benefit of such proof as was administered in connection with the value of the use of the improvements to the 90-inch press. There, under the evidence, the court had no hesitation; here, the court finds itself compelled to grope its way to an equitable decision.

The court would remand the case if it had reason to suppose that any good could be accomplished thereby. But the situation is not the same as in the matter of the improvements to the 90-inch press. There, after payment of the royalties demanded by the Webbs, a wide margin of profit was still left to the company. Here, if the royalty demanded were paid, there would be little, if any, profit left to the company. Possibly there would not be enough to pay the royalty. Under these circumstances, there is nothing for the court to do but to fix, as best it can, what proportion of the profits should go to the owners of the invention and what proportion to the company for exploiting it.

The facts to be taken into consideration are, on one side, that the Webbs were under no obligation, legal or moral, to let the company have the benefit of this invention, but were at perfect liberty to dispose of it to others, or to organize another company to exploit it, or to retire from the management of the affairs of the company and exploit it themselves, and that any one of these courses, ¹⁹⁰ especially that of retiring from the management of the affairs of the company and exploiting the invention themselves, would have been fatal to the company, so that they were in a position to dictate terms to the company.

The facts on the other side are that it was of very great advantage to the Webbs to exploit this invention by and through the company, rather than to undertake to start a new business. The company had been carrying on a prosperous business, extending to every part of the cotton growing region, and was widely and favorably known, and was operating with a large capital. Its reputation, business standing, credit, and good will was worth a great deal to the Webbs in undertaking to exploit this 80-inch invention. All the capital of the Webbs was invested in the company, and could not be available to them for a new business until after liquidation of the existing company and settlement with the Crichtons. They themselves were owners of eighty-three per cent of the company, and were very largely interested, therefore, in not breaking it up.

The question is, what amount the parties, respectively—the Webbs representing both their interest in the invention and their interest in the company, and the Crichtons representing their interest in the company—would likely have been willing to agree to, under the circumstances, or, rather, what amount it would have been equitable for them to agree to. The Webbs furnished the invention, and the company furnished all else,

including the services of the Webbs themselves, who are the employees of the company owed to it their time, business capacity and energies.

Under all the circumstances, those mentioned heretofore weighing more or less in the case, the court ordered that a division of the profits of the 80-inch press business in the ratio of one-third to the ¹²¹ company stockholders S. J. and R. D. Webb would be fair and just. "Net profits" is meant "net profits."

The court takes into consideration the fact that the holders of the company receive the additional benefit of the 90-inch press business through the management of the company and in due course of business by a prudent or other more or less expensive mode of operation.

It goes without saying that the court cannot and does not make a contract for the parties, but only deals with the case as far as it is an accomplished fact, and that the payment of the profits is to operate only so long as the present situation shall continue, either the company or the Webbs being at liberty to put an end to it at any time by ceasing to use the 80-inch invention in the company's business.

It is therefore ordered, adjudged, and decreed that the same be set aside; that the case be remanded for further trial in accordance with the views hereinabove expressed on the question of the expense accounts of S. J. Webb and R. D. Webb, as managers of the affairs of the corporation, the profits realized from the 80-inch press business, of the three 80-inch presses built in 1899, be divided between the company and S. J. and R. D. Webb in the proportion of one-third to the former and two-thirds to the latter; resolutions fixing the salaries of S. J. Webb and R. D. Webb be made to operate only from their respective dates; the board of directors of the corporation are hereby ordered to declare at once and pay to the stockholders, in the proportion in which they are entitled to same, a dividend of \$50,000, the report of the experts as found in the record be set aside as to conform to the present opinion and judgment, and the judgment as may hereafter be rendered upon the item of expense accounts of S. J. Webb and R. D. Webb, and in all respects it be approved; and that the defendant pay the costs of this suit.

Justice, C. J., concurs in the decree.

actions Between Directors of a corporation and the corporation—discussed in the extended note to *Beach v. Miller*, 17 Am. 298-308. It is said in a recent California decision that an individual is not qualified to act for his company in a transaction wherein the corporation is dealing with him: *Pacific Pickle Works v. Smith*, 145 Cal. 352, ante, p. 42, and see cited in the cross-reference note thereto.

may Compel Directors of a corporation to declare dividends of holders of preferred stock who are shown to be entitled to them: *Hazeltine v. Belfast etc. R. R. Co.*, 79 Me. 411, 1 Am. St. R. 100.

CHRETIEN v. NEW ORLEANS RAILWAYS COMPANY.

[113 La. 761, 37 South. 716.]

RETT RAILWAYS, When not Answerable for Carelessness in **causing Unreasonable Fright and Rash Action.**—Though a railway company is careless with respect to an electric wire, it is not necessarily answerable to a passenger whose injuries were caused by its acting rashly under the circumstances and in a manner not justified by the reasonable apprehension from the surrounding circumstances that he was in danger of loss of life or of great bodily injury. (524.)

by Joseph Rossi and Benjamin Rice Forman, for the plaintiff.

by Kernal, for the appellee.

NICHOLLS, J. The plaintiff claimed from the defendant ten thousand dollars as damages for the death of his son, Chretien, whose death, he alleged, was caused by the negligence of the defendant. Plaintiff alleged that the deceased was a passenger in one of the company's cars on the 17th of February, 1903, and was entitled, by his contract with it, to a safe passage.

The plaintiff averred that while his son was so riding as a passenger in the car it was so defective that there was a loud and violent explosion of electric energy, endangering the life and limbs of the passengers, filling the car suddenly with light and fire, and that his said son either rushed from the car to escape the threatened danger or was thrown from said car and striking his head on the rail, and breaking his skull; that he died from the 17th until the 23d of February, 1903, and died from said injuries.

Plaintiff alleged that the loss of his son ⁷⁶³ was caused by the defendant's negligence and breach of contract; that the defendant had not taken proper steps to have prevented said injury, and did not do so; that there was no negligence nor fault on the part of his son.

Defendant answered, and, after pleading the general issue, it denied specially that the death of plaintiff's son resulted from its negligence or want of care, but averred that, on the contrary, his injury, suffering and death were due entirely to his own want of care and caution and gross negligence in taking the car. In the event that any contributory negligence should appear in the case, defendant averred that deceased was guilty of contributory negligence, and brought about his own injury.

The case was tried by jury, which returned a verdict in favor of the defendant.

A motion for a new trial, based on the ground that the verdict was contrary to the law and the evidence, being of no legal effect, judgment was rendered in favor of the defendant, and plaintiff appealed.

The evidence shows that on the morning of the 17th of February, 1903, at about 4:30 o'clock in the morning, which was yet dark, Jerome Chretien, a son of the plaintiff, employed as a passenger, at the corner of Esplanade and Mystery street, was one of the electric cars owned and operated by the defendant. As the car moving forward later approached Crete street, the trolley wire parted and fell. In so doing it struck the plaintiff, who was on board in front of the platform of the car when it fell. The lights on the car went out, but immediately afterwards there was a flash or lighting upon the front platform, accompanied by a popping noise, but louder, like that made by the explosion of a firecracker.

Chretien was at that time leaning upon one side of the car door, which was then open, talking to the conductor, who was standing upon the ⁷⁶⁴ rear platform. The falling of the wire, the extinguishing of the light, and the noise referred to were practically simultaneous, the whole not occupying more than a few seconds. When this occurred, the conductor rang his bell three times as a signal to the motorman to immediately stop, and went into the inside of the car to ascertain what had happened. When he did so, Chretien (acting evidently upon a first impulse) ran outside of the car upon the rear platform and jumped off it into the street. The car was moving at the time when he did so.

Chretien, as he touched the ground, fell with such force as to fracture his skull, and from this fracture, after

day or so, he died. Had he remained upon the car he have received no injury. There were in the car at the the falling of the wire four persons, two of the four men employed by the defendant company as conductors were on the way to take up their employment for the day, n, and one passenger beside himself. On the front and platforms of the car were its conductor and motorman at ations. No one of these men was hurt in the slightest and none save Chretien were at all frightened or made ensive by what had occurred. The car itself was not , nor does any part of it appear to have been even d. The testimony of the persons who were inside the s at variance with that of Pourpart, one of plaintiff's es, as to the car being enveloped on the outside by light es.

current being cut off by the falling of the wire, the car as soon as it lost the momentum which it then had. r force was immediately telephoned for by the conductor, reached the place in about fifteen minutes. The man ge of the repair work found that a trolley wire had fallen, d of which was lying behind the car and between the crossing one of the rails; ⁷⁶⁵ the other end still attached

An examination disclosed the fact that the end of the wire had become annealed for some considerable distance, annealing, under the evidence, had the effect of softening the wire and rendering it pliable, so that it could be easily , and also of discoloring it.

evidence of neither the plaintiff nor the defendant dis- what occasioned the falling of the wire. Plaintiff's coun- gests that the wire was inherently weak, and that the ed condition of the wire showed it must have been in- before the accident; but the evidence establishes, we think, at condition followed as the result of the falling of the and was not its producing cause. Defendant's evidence that there had been no defect in the wire apparent to the or to the accident; that everything seemed right upon e; and that it had been quite recently thoroughly and inspected.

atever may have been the cause, it is clear that the acci- n itself and of itself was harmless. Assuming that de- at company was in point of fact in some way careless in t to the wire, it would by no means follow that because h carelessness it would be responsible for the injury t-

Chretien. If the connection between the falling wire and Chretien's injuries was simply that the latter, springing an electric car running at high speed into a stony street upon his assumption that by the falling of the wire he would be placed in danger of his life, or would receive great harm, the company could not be held liable for his acting upon a wrong assumption when the circumstances of the case were not such as would have given rise reasonably to such a notion or apprehension on the part of an ordinarily prudent and careful person. The plaintiff states the position he takes for in the syllabus of his brief as follows: ⁷⁰⁶ "If a company so operates its trains as to place its passengers in a position apparently so dangerous and hazardous as to excite in their minds a reasonable apprehension of peril and induce them thereby to excite their alarm, and induce them to make efforts to escape, and in such efforts they receive personal injuries, the company is responsible in damages," etc.: *Green v. Pacific Lumber Co.*, 10 Cal. 435, 62 Pac. 747; *Wanzer v. Chippewa etc. Ry.*, 103 Wis. 319, 84 N. W. 423; *Washington etc. R. R. Co. v. Cullen*, 155 U. S. 5 App. D. C. 436; *Meesel v. Lynn etc. R. R. Co.*, 100 Mo. 234; *Bischoff v. People's Ry. Co.*, 121 Mo. 216, 25 S. W. 2d 234; *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21.

Defendant contends that the principle controlling the decision in this case is a familiar one, and that it has been applied by the court in several cases, but that the exact question presented by the facts has not yet been passed upon here. Compare *Lehman v. Louisiana etc. R. R. Co.*, 37 La. Ann. 70, 10 So. 2d 1; *St. Louis etc. R. R. Co.*, 45 La. Ann. 1204, 14 So. 2d 23; *L. R. A.* 152; *Russel v. Shreveport R. R. Co.*, 50 La. 501, 23 South. 466; *Stokes v. Saltonstall*, 13 Pet. 15, 5 U. S. ed. 115; *South Covington etc. R. R. Co. v. Ware*, 84 U. S. 1 S. W. 493; 2 *Rorer on Railroads*, 1092, 1093; 1 *American Railroad Law*, 1st ed., 475; *Pierce on American Railroad Law*, later ed., 329; 2 *Thompson on Negligence*, 1092; *Beach on Contributory Negligence*, 3d ed., section 1; *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *Shaw v. Boston etc. R. R. Co.*, 78 Me. 52, 2 Atl. 678; *Twombly v. Central Park etc. R. R. Co.*, 69 N. Y. 158, 25 Am. Rep. 16.

Plaintiff's counsel say: "That through some defect in the wire or electric conductor through which the electric current was conveyed to the motor broke and fell upon the plaintiff, and a sudden blaze of light, apparently enveloping him, and a loud noise or report, as of an explosion. Chretien, unable to apprehend that his life was in

from electricity, and that he was in great danger of in-
 uth, and, seeking to escape from that danger, he jumped
 e car and fell, and struck his head on the rail, fractured
 l, and, after lingering, died."

endant's counsel insist that, conceding for argument
 they did not in fact admit) that the company had been
 f ~~767~~ negligence in not preventing the falling of the
 e question for examination was whether the circum-
 were such as to create in the mind of an ordinarily
 person a reasonable fear or apprehension of bodily in-
 They say that they were not of such character. They
 at:

her the motorman nor the conductor left their positions,
 dging by the evidence, no other person in the car attached
 ortance to the incident. It apparently made no impres-
 them of fear or danger. . . . The jury evidently did
 ieve the version of Pourpart [one of plaintiff's wit-
 that the car was surrounded by flames covering it from
 ootom, and they were justified in that conclusion; and
 t perfect contradiction was the fact that there was no
 n the body of the car showing the presence of fire, flames
 e."

sudden going out of the lights in an electric car is not
 usual occurrence. Anyone who travels in those vehicles
 ergone the experience, and must have noticed the move-
 f the light when the trolley is adjusted to the wire, and
 ve heard the popping or blowing out of a fuse. Counsel
 n that, even if Chretien left the car under the agitation
 and apprehension, he was not justified in so acting, and
 twithstanding the company may have been primarily
 of negligence in causing the fear or apprehension; that
 not every trivial or common-place accident happening in
 the vehicles of locomotion which would justify one in
 such desperate chances as he took. The law did not
 me to do a thing of this kind, and recover, even though
 road company was in fault. Under the settled jurise-
 ce, Chretien is shown to have acted in a manner unusual
 traordinary, without sufficient justification or provoca-
 ad his unfortunate accident could not be attributed to
 'endant."

following language, which defendant's counsel quote as
 been used in the case reported in South Covington etc.
 Co. v. Ware, 84 Ky. 270, 1 S. W. 493, meets with ou
 al: "The character of the impending danger, or at le

ALLEN & CURREY MANUFACTURING COMPANY v. SHREVEPORT WATERWORKS COMPANY.

[113 La. 1091, 37 South. 980.]

CONTRACTS, Who may Become Parties to.—A person may be a party to a contract in only one of two ways: 1. By entering into it himself directly or through his agent; or 2. By accepting stipulation made in his favor by the contractants. (p. 526.)

MUNICIPAL CORPORATIONS—Waterworks, Citizens and Taxpayers, When not Parties to Contracts of with.—If a municipal corporation enters into a contract with a water company to furnish water for the extinction of fires and other purposes, it does not, in such case, act as agent for its citizens and taxpayers, nor do they become parties to such contract and entitled as such to maintain an action for damage suffered by them for its nonperformance. (p. 526.)

CONTRACTS With Water Companies, Stipulation in, When for Autrui.—A contract between a municipal corporation and a waterworks company by which the latter agrees to furnish water for the extinction of fires, flushing sewers, etc., though intended for the benefit of citizens, does not constitute a stipulation pour autrui, and they cannot maintain any action for the breach of such contract under a provision of the code declaring that the only action is that which does not immediately arise from the contract, but from equity in favor of a third person not a party to it and for whose benefit certain stipulations have been made." (p. 526.)

For, Jones & Kruttschnitt and Wise, Randolph & Randall, for the appellant.

Butcher & Welsh, Alexander & Wilkinson and Fenner, Henderson & Fenner, for the appellee.

PROVOSTY, J. The plaintiffs' lumber manufactory in the city of Shreveport was destroyed by fire, and plaintiffs bring this suit in damages for the loss against the Shreveport Waterworks Company, a private corporation having the waterworks franchise of the city of Shreveport.

The complaint is that in consequence of the neglect and failure of the plaintiff company to keep its hydrants in good order, and as by its contract expressly obligated to do, the hydrant which the firemen first attached their hose could not be opened, and that, but for the time lost in vain efforts to open the hydrant, and in detaching the hose from the same and attaching them to the next nearest hydrant, the fire would have been put out, and the loss averted. The trouble with the

plaintiff was that the steam engine to open the valve in its motion instead of turning the valve, it having turned the engine in motion by which it was anchored were having disappeared. Plaintiff stated that the engine had been worn away by use or eaten by rust, the engine was that they were worn off by a too great amount of force by the engine's frame, and that, even if the engine had turned to perfection, the engine had been put out of having already attained perfection. Another contention of defendant is that it was required in the business and keeping them in order, and as such as those of a lesser, and that a person is liable for the maintenance of the thing less in the case of a person with reference thereto, and as in the case of a person and still less proof, of such in the case.

But all these questions will not have to be gone into, and again with reference to another defense, which is the same in fact and which disposes of the case. Plaintiff are not party to the contract sued on, and defendant are not party to the contract, that defense notwithstanding that if plaintiff have an action on the contract they have no standing to dispute its nature or its breach. As a matter of course plaintiff do not pretend that the contract is a contract may have an action upon it, and that they are party to the contract between the two parties to the contract.

A person may become a party to a contract in only one way. First, by entering into it himself, either directly or through an agent, or secondly, by accepting a stipulation in his favor by the contractants, he remaining a third party to the contract. Such a stipulation is called in the law a "stipulation in favor of a third party," "third party" meaning some one who is not a party to the contract, that is to say, a person not party to the contract.

There are two ways of becoming a party to a contract, one exclusive of each other, since a person cannot be a party to a contract either directly or through an agent, and a third person or stranger can be a party to a contract only by the agreement of the learned counsel. However, their contention is that plaintiff are not party to the contract in both ways; that is to say,

because the city entered into the contract as their agent is to say, as the agent of the inhabitants and corporators among whom they are numbered—and also because the ratification of the contract was in their favor, as third parties by the present suit they have accepted it. The two theories were blended in learned counsel's argument, but for discussion they must be dealt with separately.

The principal that the city entered into the contract, so appears from the face of the contract. But the learned counsel argue that the authority given to the city by its charter provide the means and make regulations for preventing extinguishing conflagrations, under which the contract was made, was thus given for the benefit of the inhabitants and corporators of the city, and to be exercised by the city in her private character, as their representative or agent, and not in her public or governmental character, as the representative of the state or public at large; that these inhabitants and corporators, as the prospective consumers of by far the greater part of the water to be furnished under the contract, are the owners of by far the greater part of the property taxed against fire, and as the taxpayers out of ¹⁰⁰⁰ whose payments under the contract would have to come, with the defendant company, the main parties in interest, the distinctive corporate interest of the city having been lost (by comparison), and that therefore they (the inhabitants or corporators, and plaintiffs among them) were the principals in the contract, and the city merely their agent for entry into it.

The argument does not take sufficient account of the separation between the municipal corporation and its corporators. For the city acted in her governmental or in her private character, still she acted as a corporation, and a corporation cannot hold any mandate from its corporators to represent them individually in making contracts. Whether there is or is not under general jurisprudence, any foundation for the contention that it does, there can be absolutely none whatever under the provisions of our Civil Code. The provisions of our code bearing on the legal relations between the corporation and its corporators are the following:

§ 427. A corporation is an intellectual body created by the association of individuals united under a common name, the members of which succeed each other, so that the body continues always the same, notwithstanding the change of the in-

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

2. Once the problem is identified, the next step is to define the objectives and goals of the project. This helps to clarify what needs to be achieved and provides a clear direction for the team.

3. The third step is to develop a plan or strategy to address the problem. This involves breaking down the problem into smaller, manageable tasks and determining the resources needed to complete each task.

4. The fourth step is to implement the plan. This involves assigning tasks to team members, setting deadlines, and monitoring progress. It is important to communicate regularly and provide support to team members throughout the process.

5. The final step is to evaluate the results of the project. This involves comparing the actual outcomes to the objectives and goals, identifying any gaps or areas for improvement, and documenting the lessons learned for future reference.

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

[illegible][illegible]

agent could enter, unless empowered to bind his principal, and that counsel will not gainsay that the Shreveport was without authority whatever to bind its agents individually to anything by this contract. She was not their agent for entering into it. It is simply impossible to constitute an agent that, while having no authority as principal to anything, he may enter into a contract for him—may stipulate onerous obligations in it, but none in return against him.

Another test is this: By ratification, any contract entered into by an agent or by a negotiorum gestor becomes absolute of the principal. The agent disappears, and the contract remains in the contract. And obligations due under the contract become his alone. Now, in this contract there is no ratification that the inhabitants or corporators individually could ratify, and there are no obligations that they could possibly assume. We have reference, of course, to that part of the contract upon which this suit is brought, and not to another part not involved in this suit. The part sued on, as will presently be seen, is the engagement of the defendant company to supply water to the city for the use of her fire department, and consideration of the payment of certain rentals, to be provided for by the city in her annual budgets. There is here nothing that the inhabitants individually could ratify, and no obligation that they could possibly assume. The fact that the corporators had an interest in the contract being faithfully carried out, it does not follow that the contractor is their mandatary or their negotiorum gestor for entering into it. I have the most direct kind of an interest in the contract entered into by the contractor who is building my house, and yet no one would say that I am a principal in such a contract, or that I have a right of action thereon. If, for fear of fire to my house from the proximity of my neighbor's, I contract with a water company to protect my neighbor's house against fire, and through the negligence of the company my neighbor's house burns down, my neighbor, who had a more direct and perhaps a greater interest in the contract than I had, cannot sue upon it under the pretense that I was his agent for entering into it. Indeed, if my house were not of the ordeal unscathed, so that the event demonstrated that my neighbor alone had an interest in the contract, and I had only ~~1000~~ none, still I should not have been his agent for entering into it, nor he have an action upon it. Nor do

the payment of taxes have the effect of constituting the municipal corporation the agent of the corporators in the contract it may enter into. No one would so contend.

The conclusion is inevitable and it is plain that in entering into this contract the city was acting as a principal, and not the mandatary or negotiorum gestor of the corporators individually.

The alleged agency of the city seems to be urged by the plaintiffs in aid of their second contention, that the city is bound to furnish hydrants to the city and keep the same under a stipulation pour autrui. But the two propositions already stated, inconsistent, we shall, in discussing the question of stipulation pour autrui, vel non, put aside all questions of agency, and deal with the case from the standpoint of the plaintiffs having been distinctly third persons to the contract, and of the stipulation having been made in their favor, if at all.

The contract is in the form of an ordinance passed by the city council. It is lengthy, and the transcribing of it would serve no useful purpose. We shall refer only to the parts bearing upon the present discussion. Section 1 provides that the waterworks franchise is granted to the defendant company "in consideration of the public benefit to be derived from," and that the waterworks are to be erected and maintained "to the city of Shreveport and its inhabitants." Section 2 fixes the maximum rates that may be charged for water furnished to individuals for private use, including fire protection. Section 3 recites that "in consideration of the public benefit and the protection to property resulting from the construction of the said system of waterworks, the city of Shreveport hereby grants to the said waterworks company one hundred and fifty nozzle fire hydrants . . . at the rate of fifty dollars per hydrant per year," and that, "In consideration of the advantage to the said city of Shreveport, the said Samuel R. Bullock and Company, their assigns, hereby agree to supply all water necessary for the extinguishment of fires, flushing sewers, engine-houses, parks, public fountains, public schools and all other public buildings; to maintain their hydrants, pipes and appurtenances in good order and working condition, and the head of the same in necessary for good and effective service at all times, without additional cost to the city." Section 11 gives the

company to shut off water for the purpose of making repairs or repairs, and provides that "no liability shall attach to the said company for the suspension of the supply of water provided the repairs or extensions are made and the water is turned on again without unnecessary delay." Section 14 of the charter of the city to make annual appropriations in its budget for the payments of the rental of the hydrants.

In making this contract, we find that the waterworks it proposes to be erected for the double purpose of furnishing water to the city of Shreveport and its inhabitants"; that is, both to the city and to the inhabitants. And we find expressly that there are in the contract two sets of stipulations or engagements: One in favor of the city of Shreveport (that is to say, in favor of the corporation), and the other in favor of the inhabitants (that is to say, of the inhabitants individually). The city stipulates and the defendant company stipulates that the inhabitants individually shall be supplied with water at a fixed maximum rate for private use, including "insurance for fire protection." And the city stipulates and the defendant company engages that there shall be leased to the city of Shreveport fire hydrants, ¹¹⁰¹ and that, in consideration of the water to be paid by the city, there shall be supplied through the hydrants, and to the city, their lessee, all the water necessary for "extinguishment of fires, flushing sewers, engine-work, etc.

Articles of our Civil Code and of our Code of Practice provide that the subject of stipulations pour autrui are the following: "A person may also, in his own name, make some advantage for a third person, the condition or consideration of a contract or onerous donation; and if such third person refuses to avail himself of the advantage stipulated in his favor, the contract cannot be revoked": Civ. Code, art. 1890. "A contract in which anything is stipulated for the benefit of a third person, who has signified his assent to accept it, cannot be revoked as to the advantage stipulated in his favor without his consent": Civ. Code, art. 1902.

The equitable action is that which does not immediately result from a contract, but from equity in favor of a third person, and for whose benefit certain stipulations have been made; thus, if we stipulate in a contract entered into with another person, and as an express condition of the contract, that this person should pay a certain sum on his death, or give a certain thing to a third person, not a party

to the act, that third person has an equitable action against the one who has contracted the obligation to enforce the stipulation": Code Prac. art. 35.

Basing themselves upon the terms of this article of Practice, that one not a party to a contract may bring an action upon it when such is the "express condition" of the contract, and also upon the originally restricted meaning of the word "stipulate," expressive of the correlation between the interrogation and the response in the formula used in Roman law for entering into a contract, the learned counsel for the defendant contend that there cannot be a stipulation pour autrui in the absence of express words to that effect. A stipulation pour autrui cannot result from implication.

We do not agree entirely with that view, for we do not think that mere form is sacramental in the matter; and we rely upon the ¹¹⁰² learned counsel for plaintiffs that the question of stipulation pour autrui, vel non, is a question of what was the intention of the parties, and that that intention is to be gathered, just as in the case of any other contract, by looking at the contract, as a whole, in the light of the circumstances under which it was entered into. But inasmuch as parties usually stipulate for themselves, and not for third persons, a strong presumption obtains in any given case that the parties intended their stipulation for their own benefit; and we do not agree with counsel for the defendant to this extent—that the implication to overcome this presumption must be so strong as to amount practically to an express declaration.

It was thus strong in the case of *Duchamp v. N. S. Mart.* (N. S.) 672, cited by plaintiffs. That was a case involving an auctioneer's bond given under a law (Act Jan. 1807) requiring the auctioneer to give bond "conditioned for the faithful performance of his duty as auctioneer toward those who shall employ him as such." Here, while the law was nominally in favor of the state, the real obligee was the person who should employ the auctioneer. Indeed, the intention in the case was not that the bond did not constitute a stipulation pour autrui, but it was that such a stipulation could not confer a right of action upon the beneficiary of it.

It is held in France that a policy of insurance taken out by an employer for the benefit of his employées, insuring them against the assumed risks of their employment—thus paying the premiums out of his own pocket—is a stipulation pour autrui, upon which the employé has a right of action.

main, the implication would seem to be irresistible, since, employé did not have a right of action, no one would have object of the contract would be defeated: *Lemiere c. Athur*, J. P., 1898, pt. 2, p. 257. But even in so plain cases the courts at first refused to recognize a stipulation pour autrui: *Société c. Soubignac*, J. P. 1897, vol. 2, p. note.

Furnishing instances where the implication was very yet not strong enough to induce the courts to recognize stipulation pour autrui, the following cases may be cited:

Brick etc. Co. v. Le Sassier, 106 La. 389, 31 South. was a suit upon a bond given by a building contractor. It was in favor of the owner, and one of its conditions: the principal should "pay all subcontractors, laborers, etc., workmen and furnishers" of materials. At the time execution of the bond there was a law requiring that any who entered into a contract with a builder should receive him a bond "for the payment of all workmen, mechanics and laborers and those who furnished materials," etc., and each of these parties should "have his individual right" upon the bond. There was, however, nothing express on the face of the bond to indicate that it had been given in compliance of that law. In its terms, it was solely in favor of the owner; and, moreover, it was for less than the amount of the building contract, and the law referred to required that the bond provided for by it should be "for the full amount of the building contract." The court held (reversing the court below) that there was no stipulation pour autrui, and that the plaintiff, a materialman, did not have a right of action on the bond.

Joseph's Association v. Magnier, 16 La. Ann. 338: The contract was that either party violating the contract should pay a way of penalty, a stated amount to the plaintiff. Held no stipulation pour autrui, and plaintiff had no right of action.

Castier c. A—, Pau, May 1, 1900, Sirey, 1900, vol. 2, J. P. 1900, pt. 2, p. 301: ¹¹⁰⁴ A contract by an employer with a physician to attend to all his sick and injured employees held not a stipulation pour autrui, and employé had no right of action against the physician for breach of contract.

La-Ward c. Cels, Dec. 20, 1898, Sirey, 1901, vol. 1, p. 1901, pt. 1, p. 270: A corporation bought a boat-load of coal, and, before having paid for it, was put in

hands of a receiver. Held, that a contract by which agreed with the receiver to pay this debt was not a *donation pour autrui*, and the seller of the coal had no action upon it.

So, where goods are consigned by A to B on a bill of lading naming A as consignor and B as consignee, for damages to the goods against the railroad for violation of the contract of carriage stipulated in the bill can be recovered by C, a third person, who avers that the goods belonged to him. *Cass.*, May 20, 1897, *Sirey*, 1897, vol. 1, p. 411.

Pothier says: "To stipulate that anything shall be done or paid to a third person designated by the agreement is not to stipulate for another. For instance, if I contract to sell an estate for a thousand pounds, which it is agreed shall be paid to Peter, it is not for you, but for myself, though I make this stipulation. Peter is only introduced into the contract as a person to receive the money for me and in my name. This is what the Roman jurists called '*adjectus solutioni*'."

"The credit for the sum does not reside with him, but with me; when he receives it, it is on my behalf and in my name, and on his receiving it there arises between him and me the contract mandate, if my intention was that he should render me an account, or a donation, if it was my intention that he should give it to him. It is not stipulating for another, but for myself, when I stipulate that something shall be done for a third person, if I have a personal and appreciable interest in its being done; suppose, for instance, I have contracted with James to rebuild his house. Thus, if I have engaged to James to rebuild his house at a certain time, and, having other work to do, I contract with a mason that he shall rebuild the house, I stipulate for myself, rather than for James, and the agreement is valid, as I am under an obligation to him, and am answerable for damages if the work is not done, I have a real, personal interest in that it shall be done. Wherefore, in stipulating that a mason shall rebuild the house of James, it is only as if I stipulate for James; *re ipsa* and in truth I stipulate for myself and for my own benefit": Pothier's *Obligations*, 57, 58.

On the strength of that passage from Pothier, this was held in the case of *Tiernan v. Martin*, 2 Rob. (La.) 523, as to a stipulation that a certain sum shall be paid to a third person, and the extinguishment of a debt due to him. The stipulation to the contract is not 'properly' a stipulation for another, it is for the exclusive benefit of the stipulating party.

inspiration of the same passage, and on the strength of *Tiernan v. Martin*, 2 Rob. (La.) 523, this court, speaking of the assumption of a city tax by a purchaser of real estate, in *People's Assn. v. Garland*, 107 La. 476, 31 South. 100, said: "In the absence of any text of law on the subject, the presumption cannot benefit the city unless it be viewed as a stipulation pour autrui in its favor. We find nothing tending to show that character upon the act. The matter was one personal to the contracting parties, exclusively in their interests, and not in the remotest degree intended for the benefit of the city, who was not a party to the contract. The assumption of the tax by another did not relieve the party assuming of his liability therefor. In contemplation of law, he remained the tax debtor. It merely gave him the right to reimburse himself against his vendee in case he were compelled to pay the tax assumed by the latter, but conferred no rights on the vendee. Thus it has been held that a stipulation that a sum shall be paid to a third person toward the extinction of a debt due to him from one of the parties to the contract is not a stipulation pour autrui, but that the assumption of the debt is part of the consideration or price of the property, intended exclusively for the benefit of the stipulating party: *Tiernan v. Martin*, 2 Rob. (La.) 523."

The doctrine inculcated by the foregoing cases is simply what has been expressed by the court of cassation in the above-cited case of *Ward c. Cels*, as follows: "If article 1121 of the Civil Code (Napoleon) permits a stipulation to be made in favor of a third person when such is the condition of the stipulation made for one's self, we must not conclude therefrom that the stipulation made in a contract susceptible of procuring advantages to one person brings into existence in favor of the latter a right of action directly against the contractor, when it has been made in the intention of the parties to confer it upon him." The court adds: "It is simply a matter of the interpretation of the contract."

The suit is upon the second of the hereinabove mentioned conditions; that is to say, it is upon the engagement of the city to supply the city with water for the use of her fire department.

It would seem to be perfectly plain that the engagement is made in favor of the city in her corporate interest, and is not a stipulation pour autrui. An engagement to furnish water to the city is not an engagement to furnish water to the in-

habitants individually. The inhabitants could neither demand its performance, nor demand the nullity of the contract on account of its nonperformance. They could not pay any price in consideration, for it is futile to say that payments made by the city out of her treasury are payments made by the inhabitants individually.

Though the stipulation is thus made by the city on behalf of the inhabitants in her own favor, in the interest of one of the branches of her municipal administration, and though the engagement is thus made by the city for supplying her fire department with water, nevertheless plaintiffs contend that the stipulation is made by the city on behalf of the inhabitants individually, and that the engagement of the defendant company is to the inhabitants individually. The city can say is that the contention is in the teeth of the plain terms of the contract.

Counsel place much reliance upon the recital that the premises and buildings are said to be rented "in consideration of the public benefit and the protection to property resulting from the construction of said system of waterworks"; but the public benefit and the protection to property is necessarily the consideration of every contract entered into by the city in the interest of her fire department. The fire department itself has no existence *raison d'être*. We fail entirely to see what comfort can derive from that recital. Counsel ¹¹⁰⁷ say the property to be protected was that of the inhabitants. As a matter of course, it was. It was all the property within the limits, public and private. But from the fact that the property was intended to be used by the city for the protection of the property of the inhabitants, it does not follow that the stipulation was intended to be in their favor individually, and to confer upon them a right of action. The contracts of the city with the firemen, by which the latter are to furnish their services in case of fire, are entered into for the public benefit and for the protection of property; but these contracts are not stipulations *pour autrui* in favor of the inhabitants individually, and the latter have no action thereon. The municipal corporation is nothing more than a fictitious being created for the purpose of administering the affairs of the public, and necessarily all its contracts are for "the public benefit"; but it does not follow that they are all stipulations *pour autrui* in favor of the inhabitants individually, and that the latter may bring suit thereon.

By keeping well in mind the separateness between the municipal being, the corporation, and the inhabitants, its cor

see very clearly that the engagement of the defendant y to furnish water for the extinguishment of fires is ly to the city, and that the only connection the inhab- have therewith is that the city is to use the water to their property, and that in that way they have an in- n the performance of the contract. But as said by the f cassation, supra, "we must not conclude that every susceptible of procuring advantages to a third person into existence in favor of the latter a right of action." materials and labor contracted for by the builder who ructing a house for me under contract are intended to on my house for my benefit, but the contracts for this d these materials are not for ¹¹⁰⁸ that reason my con- and I have not an action thereon.

essential point must always be as to whether there was ention to confer a right of action. Counsel say that it ot only the right, but the duty, of the corporation, in such a contract, to embody provisions for the benefit inhabitants." If by this is meant that it was the duty city to see to it that the defendant company should be d to furnish water to the inhabitants individually, when ired, at a fixed maximum rate, for private use, includ- ividual fire protection, we say the city has done that ing. But if it is meant that it was the duty of the impose upon the defendant company the liability which ntiffs are here contending for, we answer emphatically was not. If the city herself owned the waterworks, she ot be under any such liability: Authorities cited at page f 52 La. Ann., and page 686, 27 South., in case of s' Oil Mill v. Monroe Waterworks Company; also 20 Eng. Ency. of Law, p. 1197. Why, then, should it be ty to impose it upon the contractor stepping into her or discharging her function of supplying her fire de- nt with water?

aps, if the city found a contractor so benevolent or simple e willing to assume such a liability without exacting addi- pay for doing so, it might be her duty to take advantage situation and impose such a liability; but where would d a contractor of that type? It goes without saying that ractor would expose himself to a lawsuit in the wake of fire, without exacting pay for so doing. And the pay have to be very heavy, for the experience of every day

teaches that the negligence of employes cannot be guarded against, and at any moment, under such a heavy damages might have to be paid. In fact, a general flagration, ¹¹⁰⁰ resulting from the negligence of an employe might utterly bankrupt the contractor. It is entirely probable that the city of Shreveport would have been willing to pose so heavy a burden upon her treasury.

Not only it was not the duty of the city to stipulate for liability, but she was without authority to do it. She was authorized by her charter "to pass such by-laws and ordinances as are necessary and proper . . . to provide the means to make regulation for preventing and extinguishing conflagrations," but she was not authorized to indemnify the contractors against any losses that might result from a negligence in service. And what she could not do directly she could not do indirectly. It not being permitted her to assume such a liability, she could not hire some one else to assume it in her place. *Becker v. Keokuk Waterworks Co.*, 79 Iowa, 419, 18 Iowa Rep. 377, 44 N. W. 694; *Mott v. Cherryvale etc. Mfg. Co.*, Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989, 15 L. R. 288; *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 28 L. R. A. 532.

In fact, it may not be so certain that the power of the city which can be exercised only for a public purpose, may be exercised for the purpose of paying indemnities to private individuals for the failure of the city to discharge one of its governmental functions. That this matter of extinguishing fires is a governmental function is well settled: *Authority in case of Planters' Oil Mill v. Monroe*, 52 La. Ann. 101, 10 South. 684. Of course, the function is not the less governmental if the city, instead of discharging it herself, hires some one else to do it; and, plainly, if the city cannot use the money derived from public taxation to pay those indemnities to private individuals, she cannot use it to hire some one to do it in her place and stand the risk of having to pay them. In such an arrangement the indemnities would in the end come out of the public treasury, for the assumption of ¹¹¹⁰ the risk would have to be paid for, and the amount of the payment would have to be the equivalent of the risk. Plus, in fact, a margin of profit.

Lastly, counsel say that, if they cannot bring suit for an alleged breach of contract, no one can—for the city is not bound and the contract is without a sanction. The answer is

of this contract is found in the right of the city to specific performance or to demand the nullity of the contract, and not in a suit in damages by persons not privy to the contract.

There is nothing anomalous or strange in the circumstance that there be losses resulting from a breach of contract, and no right of action in anybody's favor. Cases of that kind occur every day. To use again the illustration of a contract with a water company to protect from fire my neighbor's property which is so close to mine as to endanger mine—in such a case neither my neighbor nor I can sue on the breach of the contract; he, because he was not a party; I, because I have suffered no loss. It makes no difference how direct and immediate the loss is. Thus in *Loeber v. New Orleans etc. R. R. Co.*, 115 La. Ann. 1151, 5 South. 60, the defendant street railroad company had agreed with the city, as part of the consideration for a franchise, to pave the street upon which the property of the plaintiff abutted, and had failed to do so, and the plaintiff brought suit to enforce performance of the contract. The court held that the contract did not contain a stipulation pour

Said the court: "Undoubtedly the stipulation of the contract sought to be enforced was consented to in the interest of the benefit of the inhabitants of the city, but it does not follow that, if the corporation fails to enforce it, the taxpayer

Barber Asphalt Co. v. New Orleans etc. Ry. Co., 49 La. Ann. 608, 22 South. 955—another suit upon the same contract—the court held: "The owners of property fronting on the street covered by the ordinance would ¹¹¹¹ have no shadow of right to control the action of the corporate authorities in this matter, and insist that the ordinance was voidable, inasmuch as by such repeal their interest would be seriously affected and injured by a repeal."

Cliff v. City of Shreveport, 52 La. Ann. 1204, 27 South. 101. The bridge had been built in pursuance of a contract between the city of Shreveport and a railroad company, according to which the surplus earnings of the bridge in any one year should be applied toward reducing the rate of the tolls for the ensu-
ing year. Citizens using this bridge, and having to pay the tolls, brought suit to enforce that stipulation of the contract. The court held that they had no right of action.

The sender of a letter or package through the mails does not have an action against the contractor for a breach of his contract with the government for carrying the mails: *German State*

Bank v. Minneapolis R. R. (C. C.), 113 Fed. 414; *Bo Co. v. Chicago etc. R. R. Co.*, 118 Iowa, 423, 92 N. W. L. R. A. 796.

We conclude that the engagement of the defendant to the city of Shreveport to furnish water to her for the fire department was not a stipulation pour autrui.

We have discussed the case thus far as if the question involved were *res nova*; but the exact question has been repeatedly in other jurisdictions, and once already by this court. Upon the latter decision—*Planters' Oil Mill v. Monroe*, 1243, 27 South. 684—the plaintiffs place much stress. But for the reasons hereinabove given, we are not satisfied with the conclusion there reached, and we have concluded to reverse it. By so doing we take this court from among a slender majority, and range it among the very large majority of the courts of the country which have had occasion to consider this question.

The decisions holding as we now do are the following: *Trust Co. v. City of Duluth*, 70 Minn. 257, 73 N. W. 126; *Boston Safe Deposit etc. Co. v. Salem Water* 1112 Co. 94 Fed. 238; *Davis v. Waterworks Co.*, 54 Iowa, 59, 185, 6 N. W. 126; *Becker v. Waterworks Co.*, 419, 18 Am. St. Rep. 377, 44 N. W. 694; *Britton v. Waterworks Co.*, 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 126; *Hayes v. City of Oshkosh*, 33 Wis. 314, 14 Am. St. Rep. 126; *Nickerson v. Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 126; *Waterworks Co.*, 37 Neb. 546, 40 Am. St. Rep. 510, 201, 21 L. R. A. 653; *Beck v. Water Co. (Pa.)*, 11 Pa. Dist. Rep. 431; *Phoenix v. Trenton Water Co.*, 42 Mo. App. 118; *Howsman v. Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 78, 146; *Fitch v. Seymour Water Co.*, 139 Ind. 214, 258, 37 N. E. 982; *Foster v. Water Co.*, 3 Nev. 44, 40 Am. Rep. 485; *Ferris v. Water Co.*, 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. W. 26; *Mott v. Manufacturing Co.*, 48 Kan. 12, 30 Am. St. Rep. 989, 15 L. R. A. 375; *Bush v. Water Co.*, 4 Id. 95, 161, 43 Pac. 69; *Wainwright v. Water Co.*, 146, 28 N. Y. Supp. 987; *House v. Waterworks Co.*, 233, 31 S. W. 179, 28 L. R. A. 532; *Waterworks Co.*, 10 Ohio C. C. 620; *Town of Ukiah v. Ukiah Water Co.*, 142 Cal. 173, 100 Am. St. Rep. 107, 75 Pac. 231; *Wilkinson v. Heat, Light etc. Co.*, 78 N. W. 126.

uth. 877; Metropolitan Trust Co. v. Topeka Water Co. decided at Kansas City by Judge Pollock, United States t Judge), 132 Fed. 702.

he holding the contrary view are the following: Paducah r Co. v. Paducah Water Co., 89 Ky. 340, 25 Am. St. 36, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77; Duncan nsboro Water Co., 12 Ky. Law Rep. 824, 15 S. W. 523; Co. Water Co. v. Ligon, 112 Ky. 775, 66 S. W. 725; t v. Greensboro Water Supply Co., 124 N. C. 328, 70 t. Rep. 598, 32 S. E. 720, 46 L. R. A. 513.

he opposing decisions have been virtually criticised in the ng pages. They are based upon the supposed agency of s municipality, and upon the fact of the contract hav- en entered into for the benefit of the inhabitants. Fur- nalysis or discussion of them would serve no useful pur- Criticism of them will be found in the following cases above cited: Mott v. Manufacturing Co., 48 Kan. 12, 30 St. Rep. 267, 28 Pac. 989, 15 L. R. A. 375; Britton v. works Co., 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 117; Hitch v. Water Co., 139 Ind. 214, 47 Am. St. Rep. 258, 15 E. 982; Howsman v. Water Co., 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784, 23 L. R. A. 146; House v. Water- Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; works Co. v. Brownless, 10 Ohio Cir. Ct. Rep. 620; Eaton terworks Co., 37 Neb. 546, 40 Am. St. Rep. 510, 36 201, 21 L. R. A. 653; Bush v. Water Co., 4 Idaho, 618, n. St. Rep. 161; Boston etc. Co. v. Salem Water Co., 94 238; Ukiah v. Ukiah Water Co., 142 Cal. 173, 100 St. Rep. 107, 75 Pac. 773, 64 L. R. A. 231. In general , it may be said of them that they obliterate the line of ecreation between the corporators and corporation, identify ndividual with the public, consecrate the anomaly of a utative contract emancipated from mutuality of obliga- and finally impose by implication a liability which, if led by the parties to be a part of their contract, would indubitably have been made the subject of an express

intiffs' learned counsel say that the majority decisions are on the absence at common law of the stipulation pour i. It may be that the cases of Mott v. Cherryvale Water Co., 48 Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989, 15 A. 375, Howsman v. Trenton Water Co., 119 Mo. 304. n. St. Rep. 654, 24 S. W. 784, 23 L. R. A. 146, Ber

v. Keokuk Water Co., 79 Iowa, 419, 18 Am. St. Rep. N. W. 694; Bush v. Artesian Water Co., 4 Idaho, 61 St. Rep. 161, 43 Pac. 70, Fowler v. Athens ¹¹¹⁴ V. 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673, Foster v. Water Co., 3 Lea (Tenn.), 42, and Atkinson v. Water Co., L. R. 2 Ex. 441, may to some extent be distinguished on that score, but not the others. In the very case v. Greensboro Water Supply Co., upon which the plaintiff mostly rely, the court said: "One not a party to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. This has been sustained in decisions elsewhere. And even when the beneficiary is one of a class of persons, if the class is sufficiently definite. See, also, 7 American and English Encyclopedia of Law, 106: "The doctrine that a third person for whose benefit a contract is made may sue upon it is adopted in many of the United States, and is frequently referred to, therefore, as the 'American doctrine.'"

It is well to note that this suit is distinctly *ex contractu*, the contract of the city with the defendant company being *ex delicto*, upon the breach of any general duty to furnish any duty specially imposed by statute. To the failure to serve that important distinction the error into which the court fell in the City of Monroe case is in great part attributable.

The judgment appealed from is set aside and the judgment in favor of the plaintiffs is dismissed, at their costs.

Land, J., recused, having sat in the case below.

If a Municipal Corporation Contracts with a water company to furnish water to be used to extinguish fires, the company is liable, according to some authorities, at the suit of a taxpayer if property is destroyed by fire by reason of the company's failure to supply sufficient water to the municipality for that purpose. v. Ukiah Water etc. Co., 142 Cal. 173, 100 Am. St. Rep. 100, v. Artesian etc. Water Co., 4 Idaho, 618, 95 Am. St. Rep. 100, v. Dennison Co., 71 Ohio St. 250. Other authorities, although probably are in the minority, take a different view: See graphic note to Baxter v. Camp, 71 Am. St. Rep. 196, 1

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

CADIGAN v. CRABTREE.

[186 Mass. 7, 70 N. E. 1033.]

BROKER, When not Entitled to Commissions.—If a broker is employed to secure a tenant of property, the terms to be approved by the owner, and the broker procures an offer which the owner declines and subsequently, in good faith, revokes the authority of the broker and terminates his employment, the fact that the owner subsequently changes her mind and effects a lease with the person first introduced by the broker does not entitle him to commissions on the lease made after his employment had ceased. (p. 549.)

Paul, for the defendant.

L. Whipple and W. R. Sears, for the plaintiff.

HAMMOND, J. This is an action by a real estate broker to recover a commission upon a lease. So far as material to the question before us, the evidence for the plaintiff, taken in the most favorable light to him, tended to show the following facts: About November 1, 1898, the defendant employed the plaintiff to procure a tenant for certain real estate owned by him. He saw several persons on the matter, among whom were one Gould and one Mann. With the latter negotiations were soon begun which finally resulted in an agreement as to the lease, and in the preparation of some papers. The Mann agreement, however, "fell through" on December 20, 1898, because the person who was to become the surety for the tenant changed his mind and withdrew. Directly after this the plaintiff renewed his negotiations with Gould and within a day or two informed the defendant that he thought he could get a good tenant. Mentioning Gould, whom he said he would "see right av

and she said to him, "All right, go ahead." On 22d, the plaintiff had an interview with Gould and were acting together, showed them certain plans, what the terms of the Mann lease were, and said were the only terms on which the property could be leased. They said they would think it over. The plaintiff referred the interview to Gilman, the general agent of the defendant, said he would see what could be done. In two or three days Gilman said he could not get the defendant to decide anything at that time. On the 1st or 2d of January the defendant and the plaintiff, according to his testimony, had an interview in which the plaintiff told the defendant of his talks with Gould and that the latter was satisfied with the terms of the Mann lease. The defendant said in that interview that she had decided not to lease but to sell. "She would not talk lease at all." The defendant did not see the plaintiff again. He wrote to her two or three times between January 2d and February 8th, the substance of the letters being that he could not sell the property for the price named by the plaintiff, that she had better lease it, mentioning Gould and Pollo. She replied on February 8th that the property was not for sale only." Meanwhile the plaintiff saw Gould and Pollo a little while" and talked with them about the defendant's property. On a letter dated March 3d, the defendant informed the plaintiff that she had withdrawn the property from the market, that she had decided to lease it, and had placed it in the hands of Fitzpatrick as her sole agent, who alone had authority to negotiate for her. Up to the time the plaintiff received the letter of March 3d, he never had heard that any other person was having anything to do with the business of leasing the property, and during this whole time he was ready and willing to act as a broker in carrying on negotiations for the defendant to Gould and Pollo. Neither Gould nor Pollo, together or separately, ever agreed with the plaintiff to lease the property, nor did either of them authorize the plaintiff to make an offer to the defendant an offer. The negotiations never reached any point. On December 28th or 29th, the plaintiff, at the request of the defendant acting through Gilman, took down the property from the estate.

On December 20, 1898, the day the negotiations for the lease ended, the defendant met Fitzpatrick, a person mentioned above, who also had been talking with the plaintiff for several months about hiring the property

Fitzpatrick spoke of Gould and Pollo as persons who would be good tenants and asked the defendant to give a lease, but she declined to consider the question of leasing property, and she continued in this frame of mind until March 12th, when, after discussion with Fitzpatrick as to whether to sell or lease she finally again changed her mind and placed the property in his hands as her sole agent to lease. This was her first employment of Fitzpatrick. On March 12th Gould was shown the property for the first time, and on March 16th the lease was given to him and Pollo. It was not contended by the defendant that the defendant, in deciding not to lease, acted in error. It is to be noted also that the testimony was consistent as to whether the plaintiff had the interview with the defendant between December 20th and January 2d, as to which the defendant testified. The defendant testified that no such interview took place, and that after the conclusion of the negotiations for the Mann lease on December 20th she did not see or have any communication with the plaintiff until the interview on January 2d. The jury might have believed the plaintiff, and we have assumed that they did.

The case was tried upon the third and fourth counts of the complaint. At the close of the evidence the justice rendered a verdict for the defendant on the third count. As to the fourth count the justice ruled that the jury would not be permitted to find in favor of the plaintiff upon the ground "that the plaintiff was the predominating, efficient cause of the lease of the property to the defendant to Gould and Pollo, and that his services were the cause of the making of that lease." The justice further ruled that the terms of the Mann lease, so called, "were not substantially the same as the terms of the lease . . . to Gould and Pollo," and that the action could not be maintained upon the fourth count, in so far as a finding for the plaintiff involved a finding that said leases were substantially alike in their terms. The justice, however, declined to rule as requested by the plaintiff that the action could not be maintained upon the fourth count, and then submitted the case to the jury, upon instructions to which no exceptions were taken.

The question is whether the justice erred in refusing to render a verdict for the defendant upon the fourth count. The case was submitted to the jury upon which the case was submitted to the jury was by the justice in the following language: "If the owner of the property employs a broker to find a customer for him, and the broker introduces to the principal a person who he says is

willing to negotiate, and if the principal and the enter into negotiations, and while these negotiations on they are suspended, or for the time, at any rate, the principal and not by the customer and afterward cipal should close the trade with that customer, the entitled to his commission. I say 'if afterward the should close the trade with that customer,' and I say gotiations are ended or suspended by the principal a the customer.' It is not enough that the broker gives of John Smith or Henry Jones, and afterward the should, through the negotiations of another broker trade with John Smith or Henry Jones; the broker c title himself to a commission by simply having given of John Smith or Henry Jones; if he does not do more than that he is not entitled to a commission he names them as customers, if he reports that to his it is enough; the ¹¹ matter has got to go further. I sult in negotiations between the customers and the after the customer has been introduced by the b negotiations begin, and, before they have resulted in by the principal of the customer's terms, they are merely, and are subsequently resumed—I am putting where the negotiations are begun and are suspended principal without having come to a definite conclusion they cannot trade at that time, and afterward the trades with that customer—a commission is due t If, however, the negotiations are ended by the custo ing an offer which is refused, then that ends that in so far as the question of a broker's commission is For instance, in this case, you will remember that in Mr. Cadigan brought an offer. It was stated by that he would not give any more than a sum then n that this statement was not a definite offer, but M brought it as an offer to the defendant; I think it w five thousand dollars a year and the owner to make pairs. Miss Crabtree refused definitely to take t That ended that as a transaction in which Gould and Cadigan's customers. If the transaction stopped nothing more happened, and then, later, Miss Crabt , that would not entitle the plaintiff to a com ing thus stated and illustrated this principle, eded to state that "the question of efficient ig to do with" the case; and, after having cal

of the jury to the conflict of evidence, to which reference hereinbefore been made, as to whether, after the lease fell through, there was any interview between the defendant and the plaintiff in which she told him to go ahead with attempts to procure a tenant, finally left the case to the jury in this concrete form: "If, after the Mann lease fell through, negotiations were in fact begun, with the defendant's knowledge and approval, by Mr. Cardigan, and if the negotiations went so far that they could be really said to be negotiated, and if after the naming of a customer they were suspended by the defendant and she afterward made a trade with another customer with whom the plaintiff had talked, then you will find for the plaintiff. If you find that negotiations were begun and the defendant ¹² did not know of them, or if you find that the negotiations did not go on at all, you will find for the defendant; but if you find that they did go on with the defendant's knowledge and approval, you will find for the

plaintiff. The evidence clearly shows that, even if after the Mann lease fell through the defendant still employed the plaintiff as to effect a lease, the authority was revoked on January 1st.

Both parties testify to this, and the plaintiff does not deny it. And that thereafterward he was ever given authority to effect a lease. The authority was revoked because the defendant, in good faith and in good faith had abandoned her intention to do so, and she notified the plaintiff of that fact. While the plaintiff was acting under her authority he had not effected a lease. More than two months elapsed after the revocation of the plaintiff's authority before one was effected. It is also to be noted that there was no proof of any usage or custom.

The jury therefore were allowed to find for the plaintiff under the conditions stated in the last paragraph of the charge, that the termination of the employment of the plaintiff and the negotiations was caused by the defendant's bona fide intention, and also irrespective of the question whether he was the efficient cause of the lease, and in the absence of any usage or custom.

It is not to be said that the proposition as thus laid down is too broad. The relation between the defendant and the plaintiff was that of principal and agent, and, as has been decided in many cases as reported in *Cadigan v. Crabtree*, 179 Mass. 397, 61 N. E. 37, 55 L. R. A. 77, the defendant had the right to discharge the plaintiff at any time.

When the defendant applied to the plaintiff to secure services she did not bind herself to give him even a time within which to procure a tenant: *Cadigan v. 179 Mass. 474, 88 Am. St. Rep. 397, 61 N. E. 37, 577*; much less did she bind herself that she would bind her mind as to the use or disposition of her property, deciding not to lease and in discharging him for that she violated no right of the plaintiff. Under the general law of agency, his rights were fixed at the time of his discharge, provided she acted in good faith. At that time the plaintiff's efforts had been unavailing and he had not earned his commission. He did not earn it by anything he did afterwards, not even shown that under the ¹³ doctrine of efficiency this term is understood when used in this connection to mean a commission. His right to work for a commission, and his right to impose any obligation upon the defendant, of holding himself ready to proceed as her agent, ended at his discharge, she acting in good faith. Such a view is sustained by the general law of agency, and, in the absence of proof of any custom or usage to the contrary, must be held applicable to this form of agency. And on principle this holds no matter what may be the stage of the negotiation, the simple introduction of the customer to the nearly completed sale, provided always that the broker has not succeeded in securing the customer ready and willing to accede to the sale of the principal. As applicable to this case we adopt the following statement of the principle as found in *Sibbald v. Hem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441*: "In the midst of negotiations instituted by the broker, and when plainly and evidently approaching success the seller revokes the authority of the broker, with the view of making the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the performance of his obligation by the broker was prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, and fairly by a view of his own interest, he has the absolute right before a bargain is made while negotiations remain unfinished before commissions are earned, to revoke the authority, and the latter cannot thereafter claim commissions made by the principal, even though it be to his detriment from the broker unsuccessfully negotiated

to some extent, the seller might justly be said to have himself of the fruits of the broker's labor."

Case is to be distinguished from those cases in which the agency has not been terminated, as well as from those in which it has been terminated in bad faith. The case is to be distinguished from those in which there is proof of fraud or usage, as in *Loud v. Hall*, 106 Mass. 404. On the other hand, then, the proposition upon which the case was submitted above stated, is too broad. The authorities also are against it. See as bearing upon the question, *W. v. Eldridge*, 184 Mass. 594, 69 N. E. 337; *Bailey v. Boardman*, 103 Ala. 641, 15 South. 900; *Fairchild v. Cunningham*, 101 Ala. 521, 88 N. W. 15; *Wylie v. Marine Nat. Bank*, 61 N. Y. 378, 38 Am. Rep. 378; *Alden v. Earle*, 24 Jones & S. 366, 4 N. Y. Supp. 366; *W. v. Corum*, 5 Kan. 608; *Livezey v. Miller*, 61 Md. 366; *Edman v. Richardson*, 100 Ky. 79, 37 S. W. 259; *Earp v. Smith*, 54 Pa. St. 394, 93 Am. Dec. 718 (cited by Gray, *Ward v. Fletcher*, 124 Mass. 224); *Uphoff v. Ulrich*, 100 Pa. 399; *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119. See, contra, *Gottschalk v. Jennings*, 1 La. Ann. 5, 45 Am. Rep. 5, which seems to be in conflict with the general weight of authority.

It is of opinion that the jury should have been instructed, as requested by the defendant, that upon all the evidence the verdict should not be warranted in returning a verdict for the defendant upon the fourth count.

Options sustained.

Principal Case is supported by *Sibbald v. Bethlehem Iron Co.*, 101 Ala. 378, 38 Am. Rep. 441. See, too, *Cadigan v. Crabtree*, 179 Ala. 4, 88 Am. St. Rep. 397, and cases cited in the cross-reference hereto.

MATTHEWS v. THOMPSON.

[186 Mass. 14, 71 N. E. 93.]

TRUST, Power to Terminate.—Where all the parties are of full age and it was created by an arrangement between the trustee and the cestui que trust were the only parties, they may terminate it at any time. (pp. 553, 554.)

TRUST, Writings Which may Terminate.—If A conveys to B, who thereupon executes a declaration in writing acknowledged nor recorded, stating that he holds the property in trust to secure certain indebtedness due to C and D and that the balance which may be made to E, and that, after such debts are paid, the balance, if any, shall be paid to F and to the heirs of C, D, and E unite in a request to the trustee B to convey the property to F, which is accordingly done, the trust is terminated where such was the intention of the parties. A statute of the state declares that no estate or interest in real estate shall be assigned, granted, or surrendered unless by a writing signed by the grantee or his attorney, or by operation of law. (p. 555.)

TRUST, Termination of, When not Prevented by Mortgages.—The fact that a conveyance of real property is made to secure the payment of specified indebtedness and added to certain pre-existing mortgages to which the trust is subject does not make the consent of the mortgagees necessary to the termination of the trust, and it may hence be ended by a conveyance made by the trustee at the written request of the beneficiary. (pp. 555, 556.)

FRAUDULENT CONVEYANCE, Effect of upon Wife's Right to Dower.—If a husband and wife convey real estate to a third person, who, in turn conveys to her, and the conveyance to the third person is for the purpose of defrauding the creditors of the husband's creditors and is, therefore, set aside as fraudulent, she regains her right to dower. (pp. 555, 556.)

FRAUDULENT CONVEYANCE.—If a Voluntary Conveyance is made under conditions in which its effect must be to defraud or defraud creditors of the grantor, the inference follows that the conveyance is fraudulent, unless there is something else to control it. (p. 556.)

VOLUNTARY CONVEYANCES, What Will not Be Set Aside as Fraudulent Character.—Freedom from moral turpitude and good and honest intention to accomplish a good object will not prevent a voluntary conveyance of its fraudulent character and its effect upon the legal rights of creditors. (p. 556.)

FRAUDULENT SETTLEMENTS—Fraudulent Intention Must be Presumed.—If, after deducting the property which is the subject of a voluntary settlement, sufficient available property is not left for the payment of the settler's debts, the law presumes that it was made with a fraudulent intent, and it becomes the duty of the judge, on giving the case to the jury, to tell them that they must presume such intent. (p. 556.)

SETTLEMENT, When must be Declared Voluntary and Fraudulent.—If a husband and wife, knowing that he is insolvent, convey substantially all his property to a third person for the purpose of having the latter convey it to another to be held in trust for him to manage the property with power to sell and mortgage the same, the settlement is voluntary and fraudulent. (p. 556.)

the net proceeds to paying taxes and assessments and certain mortgages, and such debts and expenses of the husband judicious to the trustee, and, on the decease of such husband sell any property remaining and appropriate the proceeds as designated in his will, and in default of a will, to such persons who would inherit his estate, the conveyance so made by such husband and wife must be held voluntary and fraudulent as against creditors, though the court finds that no purpose of cheating was intended and the parties acted with an honest intention. (pp. 558-559.)

POWER is Waived in Massachusetts by the widow's acceptance of the provisions of her husband's will. (p. 559.)

A suit in equity was commenced by Matthews as administrator with the will annexed of the estate of Joseph Thompson, claiming the land as fraudulent as against his creditors a conveyance in land made by him through a third person to the defendant, V. Mabel Thompson, or, in the alternative, to have her appointed a trustee for the benefit of the plaintiff as such administrator.

Another suit was begun by Henry, Elizabeth B., and M. Thompson, brother and sisters of said decedent, to set aside a trust in the same lands for their benefit. The two suits were heard together and by the trial judge reported for the determination of the full court. The will, so far as material to these suits was as follows:

I direct that all my just debts be paid.

I give and bequeath all my real and personal estate as hereafter provided to the Boston Safe Deposit and Trust Company as Trustees, to be held by them for the following purposes.

I direct said trustees to pay the income derived from said real and personal estate as above, in the following manner, to my wife, V. Mabel Thompson, during her life, one-third of the income derived from said estate; to my daughter, M. E. Thompson, during her life, one-third of the income derived from said estate.

I also direct that one-third of the income derived from said estate shall be held by said trustees for the benefit of my daughter, Maud V. Thompson, to be paid by said trustees in the following manner: a sum not exceeding such amount as may be deemed expedient by the said trustees for necessary living expenses, together with any expenses for educational purposes until she arrives at the age of twenty-one, when she is to receive the income in the same manner as provided for my wife and daughter, Mary E. Thompson.

In the event of the decease of my wife or either of

my brothers, their third of said estate shall be added principal and the income derived to be paid to the survivors of my said wife and two daughters.

"With Upon the decease of my wife and two daughters income from said estate to be divided in such a manner give each of my children or their issue an equal share. Upon the death of all my children the estate to be divided according to the laws of the commonwealth of Massachusetts."

R. Spring and R. S. Warner, for the plaintiff in case.

C. E. Shattuck and P. M. Ives, for the plaintiffs in second case.

G. W. Anderson, for the defendants, V. Mabel Thompson and Maud V. Thompson.

¹⁶ KNOWLTON, C. J. Edward Thompson, the testator, the plaintiff in the first suit, became indebted from time to time in a considerable sum to his unmarried sisters, F. B. Thompson and Frances M. Thompson, who were of the family and unfamiliar with business. Of his own motion he gave them as security a mortgage of the real estate in question subject to other mortgages which together amounted to thirty-seven thousand dollars, and afterward he caused to foreclose this mortgage. A conveyance of the property subject to the prior mortgages, was made to his son, who acted as agent of these sisters of the testator. Subsequently the testator caused his son to convey the property to the nephew, one Eldridge, who executed a declaration of trust for the benefit of the old ladies to secure them for their mortgage debts, and also for the benefit of their son, ¹⁷ Henry Thompson, to secure him for any advancement he might make to Edward Thompson, and any other claims that he might hold against Edward. The declaration also provided that after the payment of these debts the son should pay the balance, if any, to Edward Thompson. This declaration was not acknowledged nor recorded. It was understood that Edward Thompson was to have the entire management of the property, and these arrangements for were made at his suggestion. At the end of about a ;

at his request, a paper was signed by the beneficiaries
t to Eldridge as follows:

"September 16, 1896.

William T. Eldridge.

For Sir: We hereby request and authorize you to convey
Edward Thompson the real estate in Boston conveyed to you
Herick P. Thompson.

"ELIZABETH B. THOMPSON.

"FRANCES MARY THOMPSON.

"HENRY THOMPSON."

Testator inclosed this paper to Eldridge and asked him
conveyance of the real estate. Thereupon, on October 6,
Eldridge conveyed the land to Edward Thompson by a
which was duly recorded, and which contained no refer-
a trust. The deed was in the form of an ordinary quit-
purporting to be for a consideration of one dollar paid
Edward Thompson, not describing him as trustee, and it
ed a warranty that the premises were free from all en-
cumbences made or suffered by Eldridge, and a warranty
the lawful claims and demands of all persons claiming
through or under him. This deed was delivered by Eldridge
Edward Thompson and was duly recorded. After this con-
Edward Thompson held the land as if it were his own,
pledged it several times for his own debts, had repeated
applications for the sale of it, and treated it in all respects as
were the absolute owner of it. The first question in the
case was whether he held it charged with a trust in favor of his
sister and sisters, so that it still remains subject to this trust
in the hands of his widow, to whom it was afterward conveyed
for lifetime.

In reference to the transfer from Eldridge to the intestate,
the presiding justice found "as a fact that the intention of
the parties interested, including that of the retiring trustee, Mr.
Edward Thompson, was not that Mr. Edward Thompson should hold as
trustee." He found "that the intention of his brother and
sister and of the retiring trustee was that the title should go
to him, Edward Thompson, and that the brother and sis-
ters relied upon his saying what he would do in regard to their
interest not because he was a trustee, but because he was their
brother and they were willing to trust him."

All the parties were of full age, and as the trust was created
by arrangement to which the trustee and the cestuis que trust

were the only parties, there is no doubt that the rule is as in *Smith v. Harrington*, 4 Allen 381; *Smith v. Bank v. Ems*, 11 Allen, 442; See 149 Mass. 127; *Edwards v. Corwell*, 116 Mass. 461. The opinion of the judge in this case is plain that they undertook and supposed that they had determined it. The second suit, the former cestuis que trust, rely upon Statutes chapter 159, section 3 (Rev. Laws, c. 159, § 3) which provides that the estate or interest in land cannot be assigned or surrendered unless by such writing as in writing signed by the grantor or by his agent by operation of law. The kind of instrument required under this statute depends upon the nature of the estate to be assigned or surrendered. In the present case the legal estate but by the record title an absolute title including equitable interests as well as legal, was assigned. This title was affected only by an unacknowledged deed of Edward Thompson. By his deed to Edward Thompson assigned and conveyed according to the record, subject to prior mortgages. This deed was an instrument in writing. The only additional instrument required was a writing which would relieve the grantor of the consequences of what would have been a breach of trust if he acted without authority from the cestuis que trust. There was no need to pass a title which was free from all encumbrances. As applied to conditions like the present, we are of opinion that the assignment of the equitable rights of the plaintiff in the second suit, made by a deed of one who held of fact title and who acted under their authority giving him title, was a compliance with the statute. If we were of opinion that a surrender of equitable rights we are of opinion that the deed which they signed was all the instrument required, it being given as an authority to be acted upon by the trustee who held of fact title. The principle is analogous to the principle applied to the surrender and cancellation of a deed of defeasance, given in connection with an absolute title. When this is done in good faith and subsequently acted upon by the person to whom the title is transferred, the original holder is estopped from setting up the instrument against the existing title: *Trust v. Trust*, 13; *Fallis v. Conway* etc. Ins. Co., 7 Allen 100. To parcel waiver by deed of the trust u

frauds, *Kline's Appeal*, 39 Pa. St. 463; *Miller v. Pierce*, C. 389, 10 S. E. 554; *Gorrell v. Alspaugh*, 120 N. C. 362, S. E. 85. The action of the parties, taken in good faith, makes it impossible in equity for the cestuis que trust to sue the trustee for a violation of his duty in making the conveyance, or to charge the conscience of the grantee having notice of the previous trust, with a duty to hold subject to the trust.

The suggestion that the trust could not be discharged without satisfaction of the prior mortgagees is not well founded. They are cestuis que trust under the declaration, but the reference to the prior mortgagees and the payment of their debts is only a recital of the prior encumbrances subject to which the trust was executed, and the payment of which would be a necessary preliminary to the payments to the sisters and brother. The court is of opinion that Edward Thompson took the property conveyed from the trust, and that the second bill must be dismissed.

The second question in the first case is whether the conveyance from Edward Thompson to his wife as a trustee is fraudulent against his creditors. There was no valuable consideration for the deed. There is nothing to indicate that his wife's release of dower was made as a consideration for anything that she was to receive or that he was to give. It did not enter into the transaction as a contractual element, but it was like the release of dower by a wife as an incident to a contract with others, to which she was not a party. If such a conveyance is set aside as fraudulent, the release falls with it, and the wife regains her right of dower: *Stinson v. Sumner*, 9 Mass. 49; *Robinson v. Bates*, 3 Met. 40; *Walker v. Walker*, 101 Mass. 169.

The mere fact that a conveyance is voluntary, especially if it is made on a consideration of love and affection, as in the case of a gift from a husband to his wife, or from a parent to his child, does not necessarily render it fraudulent against creditors. Whether it is fraudulent or not depends upon the circumstances under which it is made: *Cook v. Holbrook*, 146 Mass. 66, 14 N. E. 3; *Clark v. McMahon*, 170 Mass. 91, 48 N. E. 939; *Bloss v. Negus*, 182 Mass. 515, 65 N. E. 846. It is ordinarily a question of fact whether a conveyance was made with intent to defraud, delay or defraud creditors. But in considering such a question the principle is applied that one is presumed to intend the natural consequences of his act. If the known conditions of

such that the effect of the act will be to hinder, delay or defraud creditors, the inference follows as matter of law, unless there is something else to control it.

In the present case the conveyance was of substantial part of the grantor's property. Both he and his wife, to whom a third person the conveyance was made, knew that he was insolvent. In fact, he owed about seventy-five thousand dollars. The conveyance was in trust to manage the property, to have power to sell and convey or mortgage all or any part of the property to apply the net proceeds to the payment of taxes and assessments upon the property, interest or principal upon mortgages when payments upon them were required, and of such other debts and personal expenses of Edward Thompson as the trustee seem judicious to the trustee to pay out of the proceeds. After the decease of Edward Thompson the trustee was to sell all the property then remaining unsold, and to distribute the net proceeds among the persons and in the manner and proportions designated in the last will of Edward Thompson, and in default of such will, among the persons who would have inherited the premises if Edward had died seised of the same, intestate. The effect of the conveyance was to put a large estate of an insolvent person beyond the reach of his creditors. Whether the creditors ever receive anything from it was made dependent upon the action of the grantee under the ²¹ trust and the action of the grantor under the power of appointment. Unless he exercised the power of appointment in favor of creditors, the property would all go, upon his death, to his heirs at law.

We have been referred to no case in which it is held that such a conveyance is valid against creditors. It is generally, not universally, held that freedom from moral turpitude, innocent and honest intention to accomplish a good purpose, the disposition of the property is not enough to relieve an action of this kind from its fraudulent character, in relation to its effect upon the legal rights of creditors: *Freeman v. L. R. 5 Ch. 538*; *Smith v. Cherrill*, L. R. 4 Eq. 390, 395; *v. French*, 6 De Gex, M. & G. 95; *Taylor v. Coenen*, 636. In the case first cited, Giffard, L. J. says: "But if the conveyance is voluntary, then the intent may be inferred in various ways. For instance, if after deducting the value of the subject of the voluntary settlement, no assets are left for the payment of the debts, the law infers intent, and it would be the duty of the court, leaving the case to the jury, to tell the jury

esume that that was the intent. Again, if at the date of settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and defraud them." In *Smith v. Cherrill*, L. R. 4 Eq. 390, 395, vice-Chancellor Malins said: "If a person makes a voluntary settlement and is, at the time, indebted to the extent of insolvency, that settlement is void as against creditors." The doctrine is the same in the federal and state courts of this country are to the effect: *Coolidge v. Melvin*, 42 N. H. 510, 531; *Freeman v. Ham*, 36 Conn. 469; *Wilson v. Howser*, 12 Pa. St. 109, 110; *Muhn v. Stansfield*, 28 Md. 210, 92 Am. Dec. 681; *Stewart v. Rogers*, 25 Iowa, 395, 95 Am. Dec. 794. In *Fellows v. Rogers*, 40 Mich. 689, 690, Chief Justice Campbell said: "Upon the facts of this case, while we do not think any fraud was intended, we think the conveyance is shown to have been without any consideration and voluntary." In *Crawford v. Kirksey*, 10 Ala. 282, 27 Am. Rep. 704, this language is found in the opinion: "Such disposition is constructively fraudulent, as to the existing debts of the grantor, no matter how innocent and meritorious the motive" with which it is made." In the *American and English Encyclopedia of Law*, second edition, the proposition is stated in this way: "If at the time of a voluntary conveyance the donor is insolvent, the deed is void as against creditors, and evidence that no fraud was intended cannot avail to sustain its character." In the note, decisions from the English and American federal courts and from the courts of thirty-five American states are cited as supporting the proposition. In this commonwealth, while in dealing with the question of fraudulent intent as a question of fact more liberality has been shown to grantors than in many jurisdictions, we find nothing to warrant us in holding that a conveyance of this kind may be held valid as against creditors. In *Kimball v. Thompson*, 4 Cush. 441, 446, 18 Am. Dec. 799, Mr. Justice Wilde shows that a conveyance made with intent to delay, hinder or defraud any creditor or creditors is utterly void, notwithstanding that no moral turpitude is indicated. In *Marden v. Babcock*, 2 Met. 99, 104, Chief Justice Shaw, in speaking of the intent, says: "If the grantor was in debt at the time, as such conveyance must necessarily tend to defeat the rights of creditors, and as all persons are presumed to contemplate and intend the natural and probable consequences of their own acts, the conclusion is irresistible that such conveyance was intended to defeat creditors,

and is therefore fraudulent." In *Norton v. Norton*, 524, 528, this is the language of the opinion: "The of property by way of gift, by one deeply in debt, if becomes incapacitated to pay his debts, is legally fraudulent to his creditors; and, if in the present case, such found to have been the fact, as to the circumstances of this conveyance, it may be deemed in law fraudulent, if no such fraudulent intention existed in the mind of the grantor, he not properly considering the amount of his indebtedness or the extent of his assets." In *Winchester v. Charteris*, 606, 609, Chief Justice Bigelow refers to a foundation for the inference, as distinguished from proof of an express intent to defraud. These are his words: "Whenever, therefore, actual fraud or express intent to hinder and delay creditors is proved, it is necessary to show that a grantor at the time of making a voluntary conveyance was indebted beyond any other available means of payment remaining after the conveyance, so as to lay the foundation for the inference that it was made with a fraudulent design." Chief Justice Morton, in *Cox v. Brook*, 146 Mass. 66, 14 N. E. 943, uses this language: "When made when a person is deeply indebted, it furnishes prima facie evidence of fraud; but this may be rebutted or contradicted. The question of fraud is not one of law, but of fact for the jury. If the facts proved are prima facie evidence of fraud, the jury should be instructed to return a verdict accordingly, unless there are other facts which control the inference. The case in this court is *Gray v. Chase*, 184 Mass. 444, 17 N. E. 767, in which it is said by Mr. Justice Lathrop that: 'Therefore, it falls within the ordinary rule, that one who is deeply in debt, and especially when he is insolvent, and who makes a voluntary conveyance which takes property away from his creditors, is presumed to intend the natural consequences of such conveyance, which is to hinder and delay his creditors': See, also, *Briggs v. Briggs*, 7 Pick. 533, 537, 19 Am. Dec. 292; *Jaquith v. Massachusetts Baptist Convention*, 172 Mass. 439, 52 N. E. 505." The question whether a conveyance was made with intent to hinder, delay, defeat or defraud creditors, in this case, is primarily a question of fact; but such facts as show a fraudulent intent, or a fraudulent purpose, control, and call for a legal inference that the intent existed. The question in a case of this kind does not turn upon the existence or nonexistence of moral turpitude in the grantor; but upon an unjustifiable purpose to

creditors of their legal rights. Nor is it important that this should be the primary, active, controlling purpose. It is enough if it is one of the purposes which was entertained, either directly or as incidental to a more active purpose. The presumption that one intends the natural consequences of his acts, under known conditions, is usually the controlling principle, in its application by courts and juries to such cases.

The presiding justice found that the parties acted with an honest intention, and that neither Mr. Thompson nor Mrs. Thompson had any purpose of cheating their creditors. This must be held to mean that they thought their act was morally right, and that they had no desire or active purpose ultimately to leave the creditors unpaid. But they knew of the grantor's insolvency, of which the attorney who made the papers was ignorant, and they knew that his indebtedness was very large,²⁴ and that this was substantially all of his property. They knew that this conveyance, if given effect, would put it out of the power of any creditor to appropriate any of this property to the payment of his debt. The further finding that they had no "intention or purpose of hindering, delaying, or defrauding any creditor of Mr. Thompson, but the purpose was to preserve the property from the threatened foreclosure for those interested therein," taken in connection with the other findings of fact, must be held to relate to the active, controlling motive under which they acted, and not to an intent and purpose which must be found incidentally to exist, from the facts, and from the inevitable consequences of their act, of which they had full knowledge. These facts were entirely uncontrolled by any other findings. They are evidence which, in law, points to a necessary conclusion as a legal inference, unless they are met by controlling facts. We are of opinion that they show a purpose and intention which were legally fraudulent, although they are not accompanied by moral turpitude, nor the desire or intention that the ultimate result should be harmful to the creditors. The deed must be set aside as fraudulent.

We already have seen that this would leave the widow with her right of dower unaffected by the release which she executed in connection with her husband's deed. But the will of her husband cuts off her right of dower, and having accepted its provisions she cannot now have her dower set out to her. She might have waived its provisions, and if she had done so, she would have been entitled to dower: Pub. Stats., c. 127, secs. 18, 20;

Barnard v. Fall River Sav. Bank, 135 Mass. 326; **Dexter v. Man**, 148 Mass. 421, 19 N. E. 517.

In the second suit the entry will be, bill dismissed. In the first suit there will be a decree for the plaintiff.

So ordered.

The Termination of Trusts and of the trustee's title is the subject of a recent monographic note to **Eakle v. Ingram**, 100 A. 101-107.

A *Conveyance may be Fraudulent* as against creditors, if it is entered into with actual fraudulent intent, or when the nature of the transaction, the conveyance must be held as a conclusive presumption of law, without regard to the motive of the debtor: **Nelson v. Leiter**, 190 Ill. 414, 82 Ill. Rep. 142; **Kingman v. Mowry**, 182 Ill. 256, 74 Am. St. Rep. 142. If the transfer must necessarily or probably hinder, defraud the grantor's creditors, it is void as against them. **Bohannon v. Combs**, 97 Mo. 446, 10 Am. St. Rep. 328; **Frederick v. Emig**, 186 Ill. 319, 78 Am. St. Rep. 283. Consult, also, **Snayberger v. Fahl**, 195 Pa. St. 336, 78 A. 818.

A *Wife's Dower* is not barred by her release executed with her husband in a deed which is afterward set aside as to his creditors: **Bohannon v. Combs**, 97 Mo. 446, 10 Am. St. Rep. 328; **Frederick v. Emig**, 186 Ill. 319, 78 Am. St. Rep. 283.

HILDRETH v. THIBODEAU.

[186 Mass. 83, 71 N. E. 111.]

JURISDICTION in Personam cannot be Acquired by the service of process at the residence of the defendants beyond the limits of the jurisdiction (p. 561.)

JURISDICTION.—The Situs of Letters Patent is at the residence of their owner and ordinarily is at his place of business. No court is authorized to assume jurisdiction over them in a case in which he does not reside and where no jurisdiction is acquired over him except by service of process on him beyond the limits of the jurisdiction (p. 561, 562.)

APPELLATE PRACTICE.—In a report of a suit in which a judge of the superior court to the supreme judicial court of the state of Massachusetts, it is not proper for him to report with a statement of the terms of reservation, as required by section 29 of chapter 159 of the Revised Laws of that state (p. 562.)

Attorneys, A. P. Browne and J. K. Berry, for the plaintiffs; and J. B. Thibodeau, for the defendants, Thibodeau.

Attorneys, J. B. Thibodeau, for the defendants, Duff and K.

NOWLTON, C. J. This is a bill in equity brought to the possession and legal control of letters patent of the States, issued upon an invention of the defendant, Thibodeau, to his wife, the defendant, Catherine M. Thibodeau, and by her assigned before the commencement of the bill to the defendants Duff and Kitzmiller. From an interim decree dismissing the bill as to the defendants Duff and Kitzmiller, for want of proper service on them, and from a final decree dismissing the bill generally the plaintiff appealed. The court does not find it necessary to determine whether, upon the facts and the report, the plaintiff would be entitled to relief. The court has no jurisdiction of all the parties, for we are of opinion that we have no jurisdiction to decide important questions in relation to the plaintiff's claim. The defendants Duff and Kitzmiller, who appear on record as the owners of the patent, are residents of the state of Pennsylvania. The only service upon them was by the delivery of a copy of the bill and order of notice to each of them at Pittsburg, Pennsylvania, where they were served. They appeared specially and objected to the jurisdiction. The court says that, as against them, the court acquired no jurisdiction to proceed in personam: *Merrill v. Beckwith*, 163 Mass. 10, 10 N. E. 855; *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 565; *Freeman v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Freeman v. Neff*, 119 U. S. 185, 7 Sup. Ct. Rep. 165, 30 L. ed. 372. It appears by the report that the plaintiff did not desire to have the bill retained for an assessment of damages against the defendants, Charles Thibodeau and Catherine M. Thibodeau. The court was, therefore, left without jurisdiction to give him the relief for which he asked, unless it had jurisdiction over the subject-matter, such that it could proceed in rem, in the absence of the owners of the title to the patent. But letters patent of the United States are not visible, tangible property which has of a local character, and of which the court can take jurisdiction apart from the apparent ownership of it. So far as such property has any situs it follows the person of its owner, and it legally belongs at his place of residence. From its peculiar character, it is property, in a sense, in all parts of the United States. But this would not justify an assumption of jurisdiction over it by a court of a state in which its owner is not a resident and where no jurisdiction is acquired over him. The case is as in *Wilson v. Martin-Wilson Automatic Fire Alarm Co.*, 154 Mass. 515, 24 N. E. 784, 8 L. R. A. 309, and *Ager v. Mur-*

THE PATENT, 55 L. ed. 942, do not go far enough in this part of his case.

To give judicial review over this patent it would be to show that the rule of Duff and Kitzmiller is fraudulent and the plaintiff or is subject to equities in his favor which may control the patent. Such proof is a proceeding in the proper exercise by the court of any jurisdiction over the patent. To a suit to determine a question of the validity of record are necessary parties. Jurisdiction over which will authorize a trial of the question, must be before a court can deal directly with the patent case. We are of opinion that the decrees appealed from are reversed.

The concluding sentence of the report is as follows: "The court of the supreme judicial court for its own and proper reason. If, in its opinion, I am right, the decree is to stand; if, in its opinion, the decree is to be entered as said court." The court is a final decree had been entered. The court is a final decree. Our only jurisdiction of the court is to complete the record for the court. The report is made under the Revised Code of the court to complete the record for the court. Such a conclusion of a report is a judgment of finality of a case by the court of a final decree from which an appeal may be taken and which is for a final decision by the full court.

Reversed and Remanded.

Where a person beyond the boundaries of a state cannot sue in court to render a personal judgment: *Wilson v. City of New York*, 100 N. Y. 368, 37 Am. St. Rep. 624; *De La Riva v. La Riva*, 112 Cal. 121, 53 Am. St. Rep. 165; *M. & L. v. Harvester Co.*, 92 Iowa 634, 54 Am. St. Rep. 100; *Peas v. Peas*, 122 Cal. 126, 13, 73 Am. St. Rep. 100.

CO. v. LUDLOW MANUFACTURING COMPANY.

[186 Mass. 89, 70 N. E. 1009.]

RIPIARIAN OWNERS.—Priority of Right by Appropriation by the Millsite Act of Massachusetts by the riparian pro- who first commences the erection of a dam, if he completes reasonable diligence and puts in operation a mill, though an- riparian proprietor commencing a dam later succeeds in com- it first. (p. 567.)

RIPIARIAN PROPRIETORS, Respective Rights of Upper and Under the millsite act of Massachusetts the riparian pro- first commencing the erection of a dam acquires priority of against proprietors on the stream above, as well as against low. (p. 567.)

CONSTITUTIONAL LAW—Taking of Property, What is not Giving as Against Riparian Owners' Rights by the Appro- of Water.—The millsite act of Massachusetts, under which riparian proprietor first commencing the erection of a dam for a may acquire priority of right to the use of the waters of a does not authorize the taking of property by the right of domain, and is constitutional. (p. 568.)

REAL PROPERTY—Contract with Respect to the Use of One does not Affect Others.—The fact that persons respectively ing to each other different parcels of land make, in connection their conveyance, an agreement not to construct a dam afford- e than a specified number of feet of fall, does not preclude a of one of them, in purchasing a different parcel, from con- g a dam in connection with it uninfluenced by this agree- (p. 569.)

in equity to enjoin the Ludlow Manufacturing Com- and the Ludlow Cordage Company from backing the waters Chicopee river by means of a dam and thereby flooding ntiff's millsite. The case was referred to a commission, on the facts found and agreed upon, ruled, as a matter that the plaintiff was not entitled to relief. When the ne on for final decree upon the master's report and the ns and exceptions thereto, the trial judge reserved and d the case and all questions of law therein for determina- the supreme judicial court.

Jones and C. L. Gardner, for the plaintiff.

L. Brooks, J. B. Carroll and W. S. Robinson, for the de- s.

NOWLTON, C. J. The plaintiff, a riparian proprietor e Chicopee river, has lately built across the stream a dam n and twenty-nine one-hundredths feet high and thre l and fifty-three feet long, with a length upon the roll

way of two hundred and ten feet. Its expenditure for development of power was two hundred and seventy-one thousand dollars. The water power is used to generate electricity, which is conducted about three-quarters of a mile up the stream to the plaintiff's factory at Three Rivers in Palmer, and thence to the plaintiff's motors. This factory previously had been supplied in part by water power taken from the river farther up the stream, and in part by steam power.

The first-mentioned defendant, the Ludlow Manufacturing Company, which will hereinafter be called the defendant, is a riparian proprietor upon the river, and at a point ten miles below the plaintiff's dam it has lately built a dam whose length is fifty-one feet, whose length is eight hundred and eighty feet, and the length of whose rollway is three hundred feet. The defendant's expenditure for this development of power was eight hundred thousand dollars. This dam was built for the purpose of enabling the defendant to generate electricity to be conducted about ten miles down the stream to furnish additional power for the defendant's old factories and at a new one in Ludlow. The defendant's dam sets backwater upon the plaintiff's dam, and in a way as very greatly to diminish the water power to which this bill is brought to enjoin the defendant from making the dam and setting back the water.

The defendant became the owner in fee, in 1891, of the land which includes the site of this present dam and the accompanying structures. In 1894, and again in 1898, it employed an engineer to take levels and make surveys, plans and drawings along and upon the property, for the purpose of determining whether or not it was practicable to erect a mill dam at the site of the dam since completed, and he did the work. In 1891 he was employed. In January, 1899, the defendant entered into a contract with him recited that the defendant had determined to erect a mill dam on this site, and required him to proceed immediately to make surveys, cross-sectionings, soundings and estimates necessary for the erection of the dam and ways, canals and other structures, and to do such other things as might be necessary for the proper development of the power on this millsite. Immediately thereafter the defendant determined upon the present height and present site of the dam, and the defendant's other agents and employes commenced to delay the work necessary for the preparation for building the dam, and to obstruct the said development, and the

and the work of construction of the dam and other
es continuously and with due diligence to the completion
within a reasonable time. The actual work of building
was begun on August 3, 1899, with the commencement
nstruction of the tail-race, and within a reasonable time
aking this beginning, the defendant completed the dam
its appurtenances, and all the transmission lines and
sm for the utilization of the water power in connection
ew mill which it had built near its other mills at Lud-
l in connection with the other mills previously con-
for the working of which this power was to be used.
rk was completed and the power was ready to be utilized
ber 16, 1901, and the mills were put in operation with
er, but the use of it was suspended by the bringing of

the fourth day of April, 1900, the plaintiff determined to
dam at the site of its present dam, and then began its
tory work therefor, and prosecuted this work with due
e until the eleventh day of August, 1900, when it began
k of excavating for the foundations of its dam, and from
ter date it continuously prosecuted the work of construc-
th due diligence to the completion within a reasonable
its dam and all appurtenances necessary for the utiliza-
the power. This work was completed on July 1, 1901.
a part of the work of building its dam, the preliminary,
paratory and the permanent work, was begun by the de-
t⁹² before the corresponding part of the work of building
ntiff's dam was begun by the plaintiff. The plaintiff's
as completed first.

principal question in the case is, What is the construc-
of the mill act as applied to these facts? The Public
es, chapter 190, section 2 (Revised Laws, chapter 196,
2) is as follows: "No such dam shall be erected to the
of a mill lawfully existing, either above or below it, on
ne stream, nor to the injury of a millsite on the same
on which a mill or milldam has been lawfully erected
ed, unless the right to maintain a mill on such last-men-
site has been lost or defeated by abandonment or other-
nor shall a mill dam be hereafter erected or raised to the
of any such millsite which has been occupied as such by
ner thereof, if such owner within a reasonable time after
ncing such occupation completes and puts in operation
for the working of which the water of such stream is a
etc.

The plaintiff contends that the defendant has violated part of the statute which forbids the erection of a dam to the injury of an existing millsite on which a mill dam has been lawfully erected; and the defendant contends that the erection of the plaintiff's dam was a violation of that part of the statute which forbids the erection of a mill dam to the injury of an existing millsite which has been occupied by the owner thereof, within a reasonable time after commencing the construction, completes and puts in operation a mill, for the use of which the water of such stream is applied.

The statute was enacted for the regulation of the rights of property owners upon streams adapted to use for the purpose of generating power. The framers of it recognized the fact that, in many cases, could not be used profitably by the owner for a short distance along the stream, without an interference with the property of other owners above and below, and the prohibition of a like use of the stream for millsites on other land. A recognition of the right of riparian proprietors of their rights at common law would often make it impossible for any of them to use the stream for power effectively. Therefore, their personal interests in the stream, the interests of the public, call for legislation modifying the common law, and regulating the rights of owners of the stream as a kind of property. Our mill act is intended to modify the common law requirement in a way to promote the development of the power from streams for the benefit of individual owners and not for that of the general public: *Lowell v. Boston*, 111 Mass. 464, 15 Am. Rep. 39. The framers of the statute recognized the possibility of a desire of two riparian proprietors owning land near together on the same stream, each to establish a mill on his own land, when an advantageous use of the water for one of the two places would make it impracticable to maintain a mill in both. This was provided for by statute. Accordingly, we have the provision quoted. This is, in substance, that as between riparian proprietors so situated, priority of appropriation shall give the right. The legislature might have established a different rule. If the time of completion of a mill had been adopted as the time which should determine precedence in the right of appropriation of the water, there would have been an inducement to owners to race to see which could first get the water. The legislature has chosen a different way the results of such a rule would be different. The rule prescribed by the statute is a modification of the common law appropriation of the site to use for the development of power.

wer, followed by a completion of the work and the ac-
of the water within a reasonable time. This is sub-
y the construction which was put upon the Statutes of
apter 74, in the case of *Bigelow v. Newell*, 10 Pick. 348,
that statute contained no special provision touching
ect. The Revised Statutes, chapter 116, section 2, was
ent language from the former act, and contained a pro-
of the erection of a dam to the injury of any millsite
ame stream. Under this statute the case of *Baird v.*
2 Pick. 312, was decided, in which it was held that the
Statutes had changed the law, and that the remedy of
had begun his mill, but had not finished it until after
mill interfering with his had been completed, was by
sment of damage under the mill act. Thereupon the
re passed the Statutes of 1841, chapter 18, which is
n almost identical language in that part of the Public
, chapter 190, section 2, on which the present defend-
es. This enactment restored the rule stated in *Big-*
Newell, 10 Pick. 348, which was held to have been
l by the Revised Statutes, chapter 116, section 2: *Storm*
chaug Co., ⁹⁴ 13 Allen, 10, 15. That this is the true
ction of this statute is further indicated by language
other cases: *Dean v. Colt*, 99 Mass. 486, 487; *Fitch v.*
, 4 Met. 426, 428. See, also, *Washburn on Easements*,
, 336, 337. For general discussion of the law, see *Ful-*
Chicopee Mfg. Co., 16 Gray, 43; *Fiske v. Framingham*
Co., 12 Pick. 68; *Fitch v. Stevens*, 4 Met. 426; *Cary v.*
, 8 Met. 466, 41 Am. Dec. 532; *Gould v. Boston Duck*
Gray, 442; *Smith v. Agawam Canal Co.*, 2 Allen, 355,

plaintiff contends that the language of the statute, on
the defendant relies, applies only to owners on the stream
and forbids their building a dam to the injury of an
proprietor who has appropriated the power by beginning
d a dam which he completes within a reasonable time,
es in connection with a mill, and that it does not apply to
uer on the stream above, who completes a dam, and seeks
e it remain with the outflow from the tail-race undis-
by backwater from the dam of one who, in like manner,
reviously appropriated the power at a point below. We
opinion that this would be too narrow a construction of
ovision. The building of a dam by an upper proprietor,
ich he claims the common-law right of a riparian owner

to have the water flow down the stream without obstruction would, if the claim were valid, be a great injury to the property of a proprietor below who had previously appropriated the power, but had been unable to complete his dam as the upper dam was completed. In such a case, if the lower dam were protected as lawfully built under the mill act, it would be to a right to have the water flow freely away from the lower dam. In the creation of power, the injury would be as great as it would be if a dam were built below which set back water upon a previously appropriated millsite above. The result would be the same which is sought by the plaintiff in the present case, to the requirement that the dam below should be lowered so as to set back water upon the upper mill. The reason for the enactment of the statute seems to require us to hold it to be a proper appropriation of water power in a stream to build a dam above or below the place where another subsequently builds a dam, with the hope of preceding the other in the completion of his work.

²⁵ This is in accordance with decisions in other states under similar statutes: *Miller v. Troost*, 14 Minn. 365, 369; *Natoma Water Co.*, 6 Cal. 105; *Kimball v. Gearhart*, 27; *Irwin v. Strait*, 18 Nev. 436, 4 Pac. 1215.

The plaintiff contends that the statute so construed is unconstitutional. We do not deem it necessary to consider the constitutionality of this statute. It has often been considered and discussed in previous decisions, and it has been affirmed. It is urged that the provision for the award of damages is inadequate. This argument is founded on an assumption that there is a taking of property without the right of eminent domain; but whatever may be the injury with the use of neighboring property by an appropriation of a millsite, it is not a taking under the right of eminent domain. *Murdock v. Stickney*, 8 Cush. 113; *Hazen v. Essex Co.*, 475; *Lowell v. Boston*, 111 Mass. 454, 464, 15 Am. 475; *Turner v. Nye*, 154 Mass. 579, 28 N. E. 1048, 14 L. R. 1048; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 28 L. ed. 889. It is unnecessary to determine, in this case, what constitutional rights one has, in reference to damages for interference under statutory authority with his right to use the water of a stream without obstruction, where the law is permitted in the regulation of the right of use, as necessary to an advantageous use of the stream. It is now important to decide what principles will

be applied in assessing the damages of the present plaintiff, in view of existing conditions. It is enough to say that in our opinion the provision for compensation for damages is adequate to meet such constitutional requirements as are applicable to a statute of this kind. Even in cases arising under statutes which authorize an exercise of the right of eminent domain, it has been held that similar provisions are sufficient to satisfy the language of the constitution: *Boston & Roxbury Mill Co. v. Newman*, 12 Pick. 467; *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394, 8 N. E. 119.

The plaintiff contends that the defendant was precluded from erecting a dam which would interfere with the right to use water power secured to the plaintiff, as between it and one Metcalf, by a parol contract in writing with Metcalf, made on September 26, 1882, but not recorded. This agreement was made in connection with a proposed conveyance from Metcalf to the plaintiff of ~~so~~ certain land on the river, and a proposed contemporaneous conveyance from the plaintiff to Metcalf of other land. In it each agreed with the other not to construct a dam for the development of his or its power, which should afford more than a prescribed number of feet fall that represented the extent of the power that was allowed to each, namely nineteen and sixty-five one-hundredths feet fall to the plaintiff and twenty-one and thirty-two one-hundredths feet fall to Metcalf. Conveyances of land were subsequently made by each to the other in pursuance of this agreement, and Metcalf afterward conveyed his land to the Ludlow Cordage Company, a corporation which holds it, as the master has found, for the benefit of the defendant as the equitable owner. The master also found that the defendant procured the sale from Metcalf to the Ludlow Cordage Company for its benefit, with full knowledge of this agreement.

We need not determine the effect of this contract in all particulars, for if we should assume in favor of the plaintiff that it was not merely a personal contract with Metcalf, but one which binds subsequent purchasers of his land who take with notice of it, we are of opinion that it is of no effect in the present case. It was an agreement made in reference to the use of the lands then owned by the respective parties, and of those which would come to them subsequently through the proposed conveyances. If a purchaser of either lot, with notice of the agreement, would be bound not to use it in violation of the agreement, it does not follow that such a purchaser would be deprived of his right to use other lands which he might chance to own in any

lawful way. The land on which the defendant's erected is nearly two miles farther down the stream land which Metcalf owned, to which the agreement. The dam was erected under the mill act, by virtue of defendant's right as a riparian proprietor at the point where the millsite was established. The agreement was either a personal contract of Metcalf or it was a contract concerning his land, which, in equity, would follow the land in the hands of a subsequent owner who took it with notice. The agreement follows the land, it has no effect upon the rights of the owner below as the owner of other land below. The ruling of the court on this part of the case was right.

Bill dismissed with costs.

A Riparian Proprietor who first erects his dam for reasonable purposes, has a right to maintain it as against proprietors above and below: Cary v. Daniels, 8 Met. 466, 41 Am. Dec. 532; Bergen v. Van Bergen, 3 Johns. Ch. 282, 8 Am. Dec. 511. An owner of a millsite on which a mill formerly stood, is entitled to an action against one who, by erecting a dam below, renders the site useless for the purpose of erecting a mill, unless the owner has abandoned the site: Hatch v. Dwight, 17 Mass. 289, 9 Am. Dec. 100.

BANK OF AMERICA v. WILSON.

[186 Mass. 214, 71 N. E. 312.]

NEGOTIABLE INSTRUMENTS—First and Second Indorsers. As between a first and second indorser, the first is ultimately liable for the payment of the note, but is not primarily liable for the payment between himself and subsequent indorsers in the sense that as between principal and surety the principal is primarily liable. (p. 571.)

NEGOTIABLE INSTRUMENTS—The Second Indorser. Right to have the Holder of a Note First Pursue the First Indorser. A prior indorser is entitled to the delay consequent on demand for payment being made in the first instance on a subsequent indorser and is at liberty to arrange with the holder to secure such payment by procuring such demand. (p. 572.)

G. E. Cobb, for the defendant.

More, for the plaintiff.

JUDGMENT. *J. This is an action by the holder of a promissory note against the second of two indorsers. The defendant admitted his liability unless he constituted a defense. The*

red to prove that this action was brought against the indorser alone, at the request of the first indorser, one or by name, under an agreement between Grosvenor and plaintiff to guarantee to the plaintiff the payment of its of this action, not to take advantage of any defense might arise by reason of this action having been brought and admitting his liability on the notes; that both are solvent and are inhabitants of the state of New is the plaintiff; and that no effort has been made to the notes from Grosvenor as the first indorser. The defendant did not offer to prove that the plaintiff had received any collateral from Grosvenor or from the maker of the note, and admitted that there was no such collateral.

The presiding judge directed a verdict for the plaintiff, and the defendant is here on an exception taken to that ruling.

In support of his contention the defendant has made an argument based on the assumption that the relation between Grosvenor and the defendant, the first and second indorsers, is that of principal and surety, the defendant, the second indorser, being the surety. There is no pretense on the part of the defendant to offer to prove that such was in fact the relation between this defendant and Grosvenor. Indeed, the defendant in his answer states that in his answer the fact is alleged that "the defendant's indorsement, as between the defendant and Grosvenor, the prior indorser, was for the accommodation of Grosvenor."

That the plaintiff, knowing these facts, 'combined with Grosvenor to bring this action against the defendant wholly in his own interest and for the benefit of said Grosvenor, who is the sole and only party in interest in the prosecution thereof,' is not pretended in the brief that there was any offer to prove this allegation.

The case before us, therefore, is the ordinary case of two indorsers of a negotiable promissory note, each of whom is directly liable to the holder if the holder elects to demand payment from either and where, if the holder elect to demand payment of the note from the first indorser, it becomes his duty to meet his obligation and to look, on doing so, to the prior indorser for repayment of the amount due on the note.

Between a first and second indorser, the first indorser is primarily liable for payment of the note, but he is not primarily liable for it as between himself and subsequent indorsers in the same way that as between a principal and surety the principal is primarily liable. It is not the duty of the first indorser, if

between himself and a subsequent indorser, to pay in the instance.

A prior indorser is entitled to the delay consequent on a demand for payment being made in the first instance on a subsequent indorser. And he is at liberty to arrange with the holder to secure such delay by procuring such a demand. It is plain that such a delay was Grosvenor's sole object in the agreement made with the plaintiff.

It is not necessary to consider whether the defendant is in his contention that such an agreement as was made in this case at bar by Grosvenor is a defense when made by one primarily liable. That question did not arise in this case.

The entry must be exceptions overruled.

The Indorsement of a note amounts to a contract on the part of the indorser, that if, when duly presented, the note is not paid by the maker, the indorser will, upon due notice of dishonor, pay to the indorsee or other holder: Dunnigan v. Stevens, 122 Ill. 396, 100 Ill. St. Rep. 496. The relation of an indorser and a holder of a note on paper is analogous to that of principal and surety: Mercantile Bank v. Macfarlane, 71 Minn. 497, 70 Am. St. Rep. 352.

FLEMING v. COHEN.

[186 Mass. 323, 71 N. E. 563.]

A PARTY-WALL is not Created by a Conveyance of land on which a specified half of the wall rests. (p. 575.)

PRACTICE—Report of a Master, When Reviewable.—A decree appointing a master does not require him to report on the facts, but all the facts on which he bases his findings are entirely reported for the purpose of presenting the principal raised and argued before him, it is open to the court on appeal to determine on the report whether the findings made by him in his rulings of law, can be sustained. (p. 575.)

CONVEYANCES, Effect of Accepting.—If there are claims between two persons respecting their boundary where the one executes and the other accepts a deed poll to a specified whereby the wall then standing and in use is divided long one-half being on the land of each, this is a complete establishment between them of their boundary lines. (pp. 575, 576.)

WALLS, When not Party-Walls Though Owned by Two Parties.—If each of two persons is seized of a specified portion of a wall, and nothing more, and no right of support or shelter is reserved to the one from the other, each can tear down his portion of the wall without regard to the injury he may do to the other. (p. 576.)

WALLS, Easement of Support in, When Results from a Con- of a Part.—Where there are buildings on adjoining lots a wall in common, and one of the proprietors grants a speci- of such wall to the other, the law implies a reservation of ment in the half of the wall granted and the grant of a cor- ing easement in the half retained. The title of each owner, sity, becomes subject to the easement of the other to support ling by means of the common structure, even though for this less than one-half was used. (p. 576.)

PARTY-WALLS, Prescriptive Right to.—After the prescrip- tion has ripened, a division wall may take on the character of a party-wall and be charged as such, though the right thus ac- quired is limited to the exact use of it by the adjoining owner who has the easement. (pp. 576, 577.)

DIVISION WALLS—Mutual Easement of Support in Where Only was in Use by the Adjacent Proprietor at the Time of Construction.—Where the wall of a completed structure stood on one line dividing two lots and for a part of its length was in a party-wall, and a conveyance was made by one of the owners of the other of a specified half of such wall, the easement of support resulting from the execution and acceptance of such conveyance was to the whole wall, and is not restricted to the part actually in a party-wall at the time the conveyance was made. (p. 577.)

DIVISION WALLS—New Structure.—The easement of support afforded by a division wall is not confined to the original build- ing; it extends to and covers a new structure that may be erected and supported by it, and if from use and the lapse of time the wall is weakened or dilapidated, or is partially destroyed, either owner may repair or rebuild it. (pp. 577, 578.)

DIVISION WALL.—The Fact that a Division Wall has Inclined from a Perpendicular and leans over from three to five inches does not alter the rights of the parties, and he away from whose side it inclines has the same right to use it as before. (pp. 578, 579.)

DIVISION WALLS—Right to Increase Height of.—Where a wall exists in which each of two adjoining owners has an equal share of support, each has the right to carry the wall up to a height greater than is necessary to support the building of the other. (p. 579.)

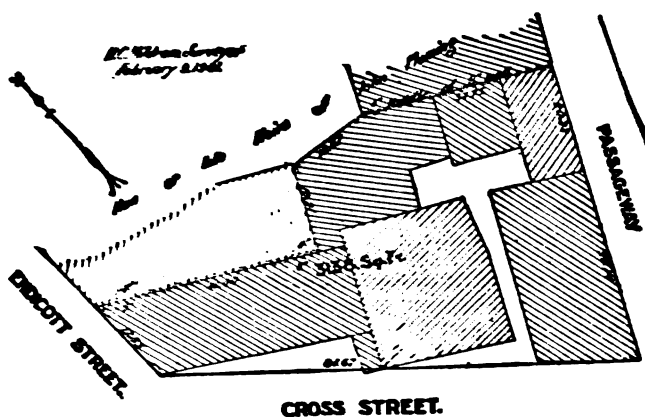
to restrain the defendant from building or completing any wall or other structure on the land of the plaintiff, and to prevent such structure already built, and for damages. The case was referred to a master, on whose report the superior court entered a decree denying a motion of the defendant to amend the order of reference to the master, ordering him to report on the merits of the evidence, and that the exceptions to the master's report be overruled and the report confirmed. The superior court entered a decree giving relief to the plaintiff as prayed for in his bill, and the defendant appealed. The plan of the premises is made a part of the opinion of the court.

E. Macy, for the defendant.

C. Allen, for the plaintiff.

224 BRALEY, J. The parties own adjoining estates, and the defendant has constructed a brick building, a small one, which is on the land of the plaintiff, unless the wall there is on the southwesterly side of the plaintiff's house, and a small one on the northeasterly side of that of the defendant, can be considered a party-wall which he could properly use in the construction of his building, and this raises the principal question presented by the defendant on his exceptions to the master's report.

The length of the entire wall is thirty-four and seven-eighths feet, of which thirteen feet running



from a passageway forms the exterior wall of an ell of the defendant, which was on his land before he built.

In the report no details are given of the dimensions of construction of the new building, and whether it was a large-ment of his old house or a separate building is not stated, but by the plan the whole area of his lot on this side of the street have been used for this purpose at the date of filing the report.

When in 1845 John Fleming, under whose will the plaintiff claims title individually and as trustee, built the house on the lot which is still standing, he used this wall of the ell to the height of two stories as a part of the southwesterly wall of his house, and added a third story; so that when the house was built, the wall, for its entire length formed the southwesterly side of the ell, and the northeasterly side of the house, and now owned by the defendant, a predecessor in title, and it may be considered as a party wall of the ell as a part of the house.

ction of his house, and to which he either had no title, or was not admitted, that a controversy arose between and to settle the dispute, Eaton, April 17, 1845, released conveyed to Fleming "a certain small strip of land four wide and about thirty-five feet long . . . adjoining the ly line of said Fleming's land, and running from a back way that leads westerly from Cross street under the brick ely erected by said Fleming, so as to embrace one-half wit, the southerly [found by the master to be meant for sterly] half of said wall," followed by a description by and bounds.

then, for a period of more than fifty-five years, this por- the wall has been used by the owners of the adjacent or the support of their respective houses.

the contention of the defendant that this release was an ent in form sufficient to make the structure a party-wall, only purports to define the line of division and contains guage that is susceptible of such a construction, and the finds "that said release is not in any sense a party- greement," and this finding and ruling was right. But ther states "that it has not been made a party-wall . . . ollication or by prescription," and it remains to be deter- whether, under the facts reported, it became a party-wall ollication of law.

decree appointing a master did not require him to report idence, and a request for such an order was afterward l, but all the facts on which he bases these findings are ntly reported for the purpose of presenting the principal on raised, and argued before him, and it is open for us to nine on the report whether the last finding which includes s of law can be sustained: *Parker v. Nickerson*, 137 Mass. Goodell v. Goodell, 173 Mass. 140, 146, 148, 53 N. E. 275. before this deed was given there were conflicting claims as boundary line, and either of the parties could have con- 326 that the other had built on his land, or Eaton alone ave been a trespasser, yet under it there can be but one uction as to its effect in determining the boundary of estate; for a deed poll being given by one, and accepted e other, was as effectual as if a formal indenture had been d; and thereafter they occupied and enjoyed their estates n the line established by the deed, and the completed wall then stood and in use was divided longitudinally, one-half on the land of each of them: *Newell v. Hill*, 2 Met. 1^o

Carroll v. St. John's Catholic Total Abstinence etc. B. 125 Mass. 565, 566; *Boston v. Richardson*, 13 Allen,

But if each was seised of a moiety of the wall, and more, and no right of support or shelter had been either could have taken down his house when he pleased regard to the injury that he might thereby cause his property: *Adams v. Marshall*, 138 Mass. 228, 52 A. 271; *McKenna v. Eaton*, 182 Mass. 346, 347, 94 Am. 661, 65 N. E. 382. Compare *Everett v. Edwards*, 158 Mass. 588, 593, 14 Am. St. Rep. 462, 22 N. E. 52, 5 L. R. A. 110.

An extended discussion is not required to show that it is reasonable to suppose that the parties contemplated such a result, or that either can be found to have intended that the other could at his pleasure practically destroy the wall by pulling down his half; for there were buildings on both lots at the time the wall had become a part of their construction; and if each had owned both estates, and subsequently sold one or the other to different owners under a similar description, there would be no doubt that this portion would be deemed a part of the estate. *Carlton v. Blake*, 152 Mass. 176, 33 Am. St. Rep. 818, 83; *Everett v. Edwards*, 149 Mass. 588, 593, 14 Am. St. Rep. 462, 22 N. E. 52, 5 L. R. A. 110.

But where estates are so situated, there is no legal distinction between a mutual grant of separate owners or a grant to one who owns both, as the law implies the reservation of an easement in the half of the wall granted and a grant of a corresponding easement in the half retained, and this part at least of the wall could not thereafter be held to be simply a measure of division, or a boundary between the houses, because it has been physically a part of each, and this determined its character. *Carlton v. Blake*, 152 Mass. 176, 23 Am. St. Rep. 818, 83; *Knight v. Pursell*, L. R. 11 Ch. D. 412. See, also, *v. Sinsheimer*, 50 N. Y. 646.

³²⁷ If no change took place in the ownership of the wall, the reason of the fact that any portion of it was covered by the wall, so that the several titles to the property remained separate, yet the title of each owner of necessity became subject to the easement of the other to support his building by means of the common structure, even though for this purpose not made a tenement.

When the five period has ripened, a division of the wall may take on the character of a party wall.

ated as such though the right thus acquired is limited to actual use of it by the adjoining owner who claims the right: *Phillips v. Bordman*, 4 Allen, 147; *McLaughlin v. ...*, 141 Mass. 252, 5 N. E. 261; *Schile v. Brokhahus*, 80 ... 614, 618; *McVey v. Durkin*, 136 Pa. St. 418, 20 Atl. ... But the master instead of giving to the defendant the full ... of this right, which would have been sufficient to support ... of prescription, limited it to only so much of the wall ... supported the floor timbers of the ell, notwithstanding the ... at after the deed the line of division was the center of the ... which had incorporated the entire end of the ell.

would be, however, a forced construction to say that the ... on of the owners was to limit their rights to the thirteen ... one which was in use as a party-wall, and while the deed ... ns no express words reciting the reasons, or specifically ... g the purpose for which it was given, the intention of the ... s must be gathered from all the facts found and stated in ... port. As the wall stood at the time it was a completed ... ure, and it may well be considered as probable that Eaton ... not have consented to the appropriation of any part of his ... unless he acquired an equivalent right to use the whole ... f he should find it convenient or profitable, or that the ... y-two feet which was in use by only one should be ruined ... ing down the other half, any more than the thirteen feet ... by both should be destroyed in the construction of other ... ings on his land.

it is now held that such use by the plaintiff as a part of her ... ing is legally proper, then the defendant, under the finding ... uling made by the master, has only a prescriptive right to ... as a foundation for the wall of the ell, and not only this, ... ut he is compelled to have a strip of his land subjected ... perpetual easement in her favor. This is a conclusion a ... of equity should hesitate to adopt, for by it the defend- ... ould be obliged to submit to an appropriation of his prop- ... for the use of the plaintiff, without any corresponding ... ; and if she now invoke the aid of equity to determine ... protect her rights of property, she must at the same time ... nize his legal and just claims in the use and maintenance ... structure, which must be considered in order for her to ... tain her suit, as held in common, but subject to an ease- ... for the sole benefit of her estate, rather than with cross- ... nents for their mutual benefit.

the length of time the wall has existed, the nature of the

use to which it has been put, the fact that the estate in its center, the uniform acquiescence of those holding the land in existing and permanent conditions all afford absence of evidence to control it, a presumption without proof that the whole wall was intended to be used in rather than considered as a mere mass of bricks and owned in severalty, with the usual incidents that may to such a tenure: *Phillips v. Bordman*, 4 Allen, 147; *Edwards*, 149 Mass. 588, 593, 14 Am. St. Rep. 462, 252, 5 L. R. A. 110; *Campbell v. Mesier*, 4 Johns. Ch. 334 Dec. 570.

The easement of support afforded by a wall of this nature is not confined to the original building, but extends to any new structure that may be erected and supported by it. From use and lapse of time the wall becomes weakened, lapidated, or is partially destroyed, either proprietor may or rebuild it: *Campbell v. Mesier*, 4 Johns. Ch. 334, 8 Am. St. Rep. 570; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 63; *v. Del Vecchio*, 4 Duer, 53; or may deepen its foundations, make additions to it on his own land if its essential character is not changed or impaired, to fit it to bear the weight of a new building: *Quinn v. Morse*, 130 Mass. 317; *Matthews v. Allen*, 149 Mass. 595, 596, 22 N. E. 61, 5 L. R. A. 102; *Allen v. Walker*, 161 Mass. 485, 37 N. E. 571; *Walker v. Stetson*, 162 Mass. 86, 44 Am. St. Rep. 350, 38 N. E. 18; *Standard Bank of South America v. Stokes*, L. R. 9 Ch. D. 68; though in some cases he may have no right to contribution for any part of the expense, even though the wall may have been improved and made more valuable for the use of an adjoining owner: *v. Stetson*, 162 Mass. 86, 44 Am. St. Rep. 350, 38 N. E. 18.

The master finds that since the original wall was built and presumably after the date of the deed, it has inclined from a perpendicular line, and it may be inferred that it leans over the land of the plaintiff from three to five inches, and it is found that the defendant in using it has strengthened and repaired the wall, built it higher than the plaintiff's house, and raised it to the top of his new building.

Attention is made in the report of any deterioration of the wall above the foundation that would authorize the plaintiff to replace the wall, and where a contract is made for the purpose of making such repairs, the defendant is liable to the adjoining owner, and may result to his property; and if the

the wall when it becomes necessary, then due care must be taken to avoid unnecessary injury to the other owner: *Eno v. Vecchio*, 6 Duer, 17; *Gorham v. Gross*, 125 Mass. 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

if the defendant could not rebuild the wall because it was too old, nor build a new wall in its place to sustain a building requiring a thicker and stronger support, even though he had acquired a right to its use in common with the plaintiff, yet he was not called upon to surrender this easement because an appurtenant sound and substantial wall during the half century and more of its existence had inclined to a slight extent toward the land of the plaintiff.

The foundation had not moved, and the defendant used the old wall as he found it, and if it had become such, any of the incidental changes from long use such as a slight inclination of the wall, if its integrity of construction remained unaffected, would not alter the rights of the parties; for in any wall of this kind these changes may be held to be fairly within the contemplation of the parties, and when they take place, do not operate to destroy the full use of the easement.

The inclination had been toward the defendant's land it could not be seriously claimed that he could maintain a suit against the plaintiff either at law for damages, or in equity for removal.

After the foundation had been made more stable, it is a fair inference, in the absence of any adverse finding by the master, that it became of sufficient solidity and strength to support the additional weight of the defendant's building, and that in the lawful improvement of his estate this use of it has not caused any injury to the wall itself or damaged the property of the plaintiff: *Matthews v. Dixey*, 149 Mass. 595, 596, 22 N. E. 595, 596, 22 L. R. A. 102.

In this situation of the parties, the right to carry up the wall to a height greater than that required to support the house of the plaintiff must be held to be fairly included within the common-law easement: *Phillips v. Bordman*, 4 Allen. 147; *Everett v. Edwards*, 149 Mass. 588, 14 Am. St. Rep. 462, 22 N. E. 52, 22 L. R. A. 110; *Allen v. Evans*, 161 Mass. 485, 37 N. E. 571; *Wicks v. Curtis*, 50 N. Y. 639, 644, 10 Am. Rep. 545.

The finding and ruling of the master "that said thirty-five foot wall is not wholly or in any of its parts a party-wall; that it has not been made a party-wall by virtue of . . . any agreement, express or implied, by implication or by prescription,"

not be sustained. A majority of the court are of opinion by reason of this error the twelfth, thirteenth, twenty-eighth and twenty-ninth exceptions of the defendant's report must be sustained, and the decree of the court overruling them and confirming the report reversed.

Parties are discussed at length in the monograph *Dunsmuir v. Handberg*, 89 Am. St. Rep. 924, 945.

DUCHEMIN v. BOSTON ELEVATED RAILWAY

[186 Mass. 353, 71 N. E. 780.]

STREET RAILWAYS—Who Entitled to Rights of Way.—A foot traveler on the highway who is approaching a car stopped to receive him as a passenger, but who has not reached the car, is not entitled to the rights of a passenger to the extraordinary degree of care due to passengers from carriers, at least so far as any defect in the car is concerned. The carrier owes him no duty to keep the pavement smooth or clear of obstructions to his progress, nor as to the car itself, than it owes to all other travelers on the highway. (p. 58)

C. F. Choate, Jr., for the defendant.

A. H. Russell, for the plaintiff.

353 BARKER, J. The action is for a personal injury occasioned by the fall of a trolley pole and car sign. The complaint in the declaration is that as the car approached the plaintiff he went toward it for the purpose of entering it, having the motorman in control notice of his intention so to become a passenger, and that as he was about to get on the car the pole fell, striking a sign upon the car and the pole struck the plaintiff, he being in the exercise of due care, and the defendant negligent.

At the trial the testimony of the plaintiff and of one of the passengers on the car tended to show that when the pole and sign fell the plaintiff was standing with one foot or both feet on the running-board of the car, and the testimony of one passenger on the car, by the plaintiff, and of seven other passengers on the car and were called as witnesses. The defendant tended to show that when

gn fell the car was not stationary, but was going slowly
l a curve at a street corner, where there was a cross-walk.
ese seven the motorman testified that he did not see the
ff until after the fall of the pole and sign, and that the
ff was then standing on the cross-walk within three or
et of the car. The conductor testified that he saw no-
n the act of getting on. That he saw the plaintiff struck
sign and that after being struck the plaintiff was from
to five feet from the car. Two others of the defendant's
ses, policemen of Cambridge, testified that they were to-
standing on the street within a few feet of the plain-
ho was standing on the cross-walk, as though waiting for
r to go by, and that he made no movement or attempt to
the car. The other three witnesses for the defendant were
gers on the car and testified that they saw no one attempt-
get on the car. Eight witnesses in all testified that the
as in motion around the curve when the accident occurred.
e defendant requested the judge to instruct the jury (1)
he plaintiff was not a passenger and that the defendant
ot owe him the degree of care owed to passengers, and (2)
he defendant was required to exercise only that degree of
toward the plaintiff which a reasonably prudent person
l exercise under the same circumstances. The judge in-
ed the jury in substance that a person desiring to ride
a street-car may have the rights of a passenger before he
lly takes his place upon the car; that where he has signaled
otorman to stop and the motorman has stopped to receive
thereby making an offer to be received and an acceptance
at offer, he is entitled to the rights and protection of a
nger as he approaches that car to get upon it, at least so
s any defect in that car is concerned.

ter a verdict for the plaintiff the case is before us upon the
dant's exception to the refusal of the judge to give the rul-
requested, and upon an exception to the portions of the
e which stated that a person may have the rights of a
passenger as he approaches a street-car and the degree of care
to a person under those circumstances. The tenor of the
of the charge so excepted to was as follows:

ow, gentlemen, I want to say before I go into the evidence
explain what I said I would explain about being a passen-
A man becomes a passenger, or at least it may be a more
rate way to say that he has the rights of a passenger, before
actually takes his place upon the car. He may do so.

man who comes to a steam railroad which has depots has bought his ticket and as he is approaching the car, all the rights of a passenger, although he has not yet reached the car or taken his seat upon it. And the person desiring to get upon the street-car, where he has signaled the motorman, and the motorman has stopped to receive him, thereby making an offer to be received and an acceptance of that offer, is entitled to the rights and protection of a passenger as he approaches that car to get upon it; at least, so far as any car that car is concerned. He is within his rights and within his contract under those circumstances as he approaches the car. In this instance, if anything falls, as in this case, from the car, it strikes him."

"They owed him the duty to use the highest degree of care which is reasonably practical in running such a road; the degree of care which is consistent with the nature and extent of the business in which it is engaged, and such as a prudent man would use to guard them against every possible contingency and every possible danger, so far as it was practicable. They are not insurers, but they owe a good deal more than the ordinary duty of care. A passenger intrusts his person, sometimes his property, to these companies, and is obliged to trust them for the protection of his person which shall be used for it; and the law has been long since settled that he is entitled to call upon them, as I have said, for the highest practical degree of care in executing such an enterprise as running a street railway. That they must do for the plaintiff the question is whether they failed in that duty, because of the failure of that duty is the plaintiff's case. If they performed that duty, they owe no further liability to the plaintiff. If they have been injured by one of those inevitable accidents for which no remedy exists, and which we all have to bear as they come up to us in the course of human life."

356 It should be noted that in the charge the jury was instructed that the suit was not brought as in the right of a person upon the street; that the standards of care are quite different in the case of a passerby upon a street struck by apparatus, and that if the plaintiff had not become a passenger he could not recover. We assume that this phraseology is understood to mean, that if the car had not stopped to receive the plaintiff, or, if he was attempting to get upon it when it had stopped for some other passenger, and he had made no sign that he intended to take the car, or

from them in return no indication of assent to such a
or if he was attempting to reach or board the car while
yet in motion, he could not recover.

leaves as the turning point of the case the question
er a foot-traveler on the highway who is approaching a
car stopped to receive him as a passenger, and before he
ly has reached the car, is entitled to the rights of a passen-
respect of that extraordinary degree of care due to pas-
s from common carriers, at least so far as any defect in
ar is concerned. In other words, the question is whether
ry should have been instructed that the defendant owed
plaintiff the same high degree of care while he was ap-
proaching the car and had not yet reached it that it would owe
passenger.

is apparent that a person in such a situation is not in fact a
passenger. He has not entered upon the premises of the carrier,
a person who has gone upon the grounds of a steam rail-
road for the purpose of taking a train. He is upon a public
way where he has a clear right to be independently of his
intention to become a passenger. He has as yet done nothing
which enables the carrier to demand of him a fare, or in any way
to control his actions. He is at liberty to advance or recede,
may change his mind and not become a passenger. Cer-
tainly the carrier owes him no other duty to keep the pavement
clear or the street clear of obstructions to his progress than
is due to all other travelers on the highway. It is under no
obligation to see that he is not assaulted, or run into by vehicles
of other travelers, or not insulted or otherwise mistreated by other
persons present.

Nor do we think that as to such a person, who has not yet
reached the car, there is any other duty as to the car itself than
that which the carrier owes to all persons lawfully upon the
highway. There is no sound distinction as to the diligence due
to the carrier between the case of a person who has just dis-
mounted from a street-car and that of one who is about to take
the car but has not yet reached it. In the case of each the only
legal test to determine the degree of care which the person is
entitled to have exercised by the street railway company is
whether the person actually is a passenger, or is a mere traveler
on the highway. We think that a present intention of becoming
a passenger as soon as he can reach the car neither makes the
person who is approaching the car with that intention a pas-
senger nor changes as to him the degree of care to be exerci-

respect of its cars as vehicles to be used upon a public way with due regard to the use of the same way by others.

The defendant incurs no responsibility to exercise extraordinary diligence by making an express contract, but only the ordinary exercise of the calling of a common carrier, and its obligation does not arise until the intending passenger is within the control. We are unwilling to go further than the doctrine in *Davey v. Greenfield & Turner's Falls St. Ry. Co.*, 177 Mass. 106, 58 N. E. 172, that when there has been an invitation on the part of the carrier by stopping for the reception of a passenger, any person actually taking hold of the car and beginning to enter it is a passenger: See *Gordon v. West End St. Ry.*, 175 Mass. 181, 183, 55 N. E. 990, and cases cited.

If the instructions allowed the jury to find for the defendant only in case the car had reached a usual stopping place and stopped to receive him, there was error in ruling that under those circumstances and before he had actually reached the car he had a right to have the defendant exercise as to him the extraordinary degree of care due to passengers. So long as he remained a mere traveler on the highway, although he stopped upon it for the sole purpose of taking the car, the defendant did not owe him any other duty than that which it owed to any other person on the highway. Whether one just has dismounted from a street-car or just is about to board one, he does not have the rights of a passenger.

Exceptions sustained.

WHO ARE PASSENGERS ON STREET RAILWAYS

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 - h. Entering or Being upon a Car Without Intention of Being a Passenger, 588.
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I. Scope of Note.

More in this series considered the question of when they become such (note to Illinois, 61 Am. St. Rep. 75), and while few, if

the cases there relied on relate to street railways, we do not doubt that all of the principles deducible from them apply equally to carriers of every class. We shall not now re-enter upon the general subject, but shall confine our attention to the decisions, strangely infrequent in number, specially relating to street railways and tending to show who are entitled to the protection of passengers thereon. What degree of care must be exercised toward them after they become entitled to such protection is foreign to the subject of this note.

II. Before Reaching the Car.

It is said that the special duty of a carrier "begins when, by coming upon his premises, or in the act of entering his vehicle, the actual relation of passenger and carrier is assumed"; *Donovan v. Hartford St. Ry. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297. There must be an acceptance by the carrier of the passenger as such. The intent of the one to take passage and of the other to receive him as a passenger is not of itself sufficient. A signal to stop may be given and responded to, and the intending passenger may be on his way to take passage, and the carman may be willing and ready to receive him, and the car may have fully stopped for that purpose, but, at least, until the proposed passenger reaches the car, and probably not until he touches it, or is in the act of placing his foot upon it, does he become a passenger: *Donovan v. Hartford St. Ry. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; *Duchemin v. Boston E. R. Co.*, 186 Mass. 353, 71 N. E. 780, ante, p. 580, 66 L. R. A. 980.

III. Entering or Attempting to Enter the Car.

a. *Necessity of the Knowledge of the Conductor or Other Person in Charge of the Car.*—"A common carrier is bound to exercise a high degree of care toward those who have put themselves under his care as passengers; but not until they put themselves under his care. Up to that time, although they may have contracted with him for their further transportation, he owes them no more care than to any third person": *Donovan v. Hartford St. Ry. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297. Courts still speak of the relation between carrier and passenger as contractual, and if so, it must be necessary for both parties to assent to the contract, either expressly or by implication. Hence, the court said in *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 207, 76 S. W. 780: "The right of a person to carriage as a passenger on a street-car rests on contract, the essential ingredients of which are that the person must signify his intention to take passage, either by word or conduct, and the carmen must assent by word or conduct to his becoming a passenger." The existence of a street railway and the movement of passenger cars over it implies an invitation to all proper persons to enter as passengers. Indeed, we do not understand that there is any right to refuse passage to any such person. It would, therefore, not seem to be material whether the representatives of

the street railway company assented to the person's becoming, or intending to become, a passenger, unless, indeed, the dissent is expressed in such terms or by such signals as to indicate that the attempt to become a passenger might be attended with peril, and hence give rise to the imputation of contributory negligence if the attempt is made and results in personal injury: *Schepers v. Union D. Ry. Co.*, 126 Mo. 665, 29 S. W. 712. The question which we are here discussing becomes material when there is an attempt to enter a car and the intending passenger is injured by its sudden starting. It is, of course, not necessary to entitle a passenger to recover, where the relation has been created, that he should show that he was expressly accepted as a passenger, or that he tendered or paid his fare, nor, on the other hand, is it conclusive that he never occupied the relation of passenger, that the railway or its employes did not know of his attempt to enter the car. If the car stopped in response to his signal, or, even in the absence of such signal, if it was standing where the passenger had a right to enter it, the willingness to accept the passenger must, in the absence of some notice to him to the contrary, be conclusively implied. A corporation, however, cannot be charged with negligence where its employes, without negligence on their part, are ignorant of the fact that a person is seeking to place himself in the position of a passenger. Though he may be about to enter the car and have placed his foot upon the platform for that purpose, still he is not a passenger, if, under the circumstances, the conductor or other person in charge of the car does not know of the intention to become a passenger nor of the act taken toward its consummation, and such want of knowledge is not attributable to negligence or inattention to duty: *Gaffney v. St. Paul City Ry. Co.*, 81 Minn. 459, 84 N. W. 304; *Pitcher v. People's St. Ry.*, 154 Pa. St. 560, 26 Atl. 559, 174 Pa. St. 402, 34 Atl. 567; *Foster v. Seattle E. Co.*, 35 Wash. 177, 76 Pac. 995.

b. **Action Taken for the Purpose of Entering.**—Where the attendant circumstances are such as to indicate an intention to become a passenger and the consent of the carmen to the consummation of this intention, or, more accurately speaking, where the intending passenger has reason to believe that the carman knows of such intention and that action is being, or is about to be, taken to carry it out, does not dissent therefrom, then any act done at or in immediate proximity to the car for the purpose of entering thereon, such as seizing hold of the railing or other part of the car to assist in the entering or stepping, or attempting to step, on the platform, at once creates the status of passenger, and entitles the person performing such act to the same degree of care as if he had entered and become safely seated in the car: *Kane v. Cicero etc. Ry.*, 100 Ill. App. 181; *McDonough v. Metropolitan R. R. Co.*, 137 Mass. 210; *Gordon v. West End St. Ry.*, 175 Mass. 181, 55 N. E. 990; *Davey v. Greenfield etc. Ry. Co.*, 177 Mass. 106, 58 N. E. 172; *Smith v.*

l. Paul St. Ry. Co., 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; *Affney v. St. Paul St. Ry. Co.*, 81 Minn. 459, 84 N. W. 304; *Murphy v. Railroad*, 43 Mo. App. 342; *O'Mara v. St. Louis etc. Co.*, 102 Mo. App. 202, 76 S. W. 680; *Garnard v. Rochester etc. Ry. Co.*, 50 Hun, 2, 2 N. Y. Supp. 470, 121 N. Y. 661, 24 N. E. 1092.

IV. Attempt to Enter Moving Car.

As entry upon a car while it is in motion is usually attended with danger and generally forbidden by the rules of street railway corporations, there is certainly no implied invitation to attempt such an entry, and he who is attempting to so enter is not to be regarded as a passenger in the absence of evidence tending to show that the person in charge of the car knew of the attempt and invited or acquiesced in it: *Baltimore etc. Co. v. State*, 78 Md. 409, 28 Atl. 397; *Schepers v. Union D. R. Co.*, 126 Mo. 665, 29 S. W. 712. Entry upon a moving car, though in violation of a rule of a street railway company, does not constitute the person so entering a trespasser, if his entry is assented to by the person in charge of the car, or the rule against such entry is otherwise waived, and, if the entry is effected in safety, the person entering thereupon becomes a passenger entitled to the same degree of care for his safety as if his entry had been made while the car was standing still, and if he is subsequently injured through the failure of the carrier to exercise such care, may recover for such injury when not connected with or attributable to the fact of his having entered the car while it was in motion: *North Chicago St. R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672. If, in response to a signal to stop, the speed of the car is slackened until it moves so slowly that the intending passenger can enter it without danger, if such movement is not accelerated, and he attempts such entry, he becomes, and is entitled to the care due to, a passenger, and may recover for injuries received from the sudden starting of the car: *Conner v. Citizens' St. Ry. Co.*, 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. 441.

V. While Transferring from One Car to Another.

If a passenger on a street railway receives a transfer or is otherwise entitled to leave one car or line to enter another for further transportation, he remains, while making the transfer, a passenger, or, at least, entitled to the same degree of care as a passenger to insure his safety from injury by the operation of the same or other cars of the carrier or from defects or negligence in the use of any of its appliances: *Walger v. Jersey City etc. St. Ry. Co.* (N. J.), 59 Atl. 14; *Keator v. Scranton T. Co.*, 191 Pa. St. 102, 71 Am. St. Rep. 758, 43 Atl. 86, 44 L. R. A. 546. If there is a platform or station upon or into which the passenger must enter to accomplish his transfer from one car or line to another, he is, while on such platform or in such station, a passenger, and entitled to recover for injuries received through the failure of the carrier to exercise the high degree

of care due from it to its passengers while actually
Lake St. E. R. Co. v. Burgess, 200 Ill. 628, 66 N. E. 211.

VI. Entering or Riding upon Crowded Cars

The fact that a car is already overcrowded might
 suspension of the implied invitation to become a passenger
 were it not for the custom, nearly or quite universal in
 of permitting gross overcrowding, and then of allowing
 ride on the platform, attach themselves to the sides, or
 the top, of cars. If, notwithstanding its overcrowded
 car keeps stopping to receive, as well as to discharge
 there is no doubt that a person entering, or seeking to
 comes a passenger under the same circumstances and
 would be regarded as such were it not already crowded:
etc. Co. v. Bynum, 139 Ala. 389, 36 South. 736. It is
 overcrowded car may stop for the purpose of permitting
 to alight without intent on the part of those in charge
 additional passengers, and it may hence be claimed that
 stopping is not an invitation to others to enter; but
 person desiring to take passage is entitled to consider
 as an implied invitation for him to do so, and if the
 charge of the car do not under the circumstances intend
 additional passengers, they must in some manner make
 known, or, at least, see that the car is not started so
 violently as to injure persons attempting to enter: *Citi*
v. Jolly, 161 Ind. 80, 67 N. E. 935.

VII. As Affected by the Place where Riding

It is notorious that the seats of a street-car are not the
 where passengers are permitted during their transit.
 car is crowded or not, they are usually allowed to stand
 the car and on the platform, and, on occasion, when
 business is very great, to climb upon or attach themselves
 sides of the car. The place where a passenger rides may
 to charge him with contributory negligence, but we ap
 it can rarely or never be conclusive that he is not a p
 entitled to the same high degree of care as other passe
 land etc. *Co. v. Donovan*, 94 Ala. 299, 10 South. 1
 ham *v. Bynum*, 139 Ala. 389, 36 South. 736; *Me*
Ellen, 234; *Young v. New York etc. Ry. Co.*,
 41 L. R. A. 193.

Persons Entering or Being upon a Car Without Become Passengers.

the general statement already made that bef
 a passenger, he must offer himself as such and
 receive him, it necessarily follows that persons on
 entering or intending to so offer themselves are no

entitled to the high degree of care due to passengers only. The best familiar instance of this occurs in the case of newsboys who, for the purpose of selling papers, are in the habit of jumping on cars, whether moving or not, and there soliciting patronage and jumping off when they have accomplished their purpose, or are commanded to do so by the carrier's employés. These boys and others who are upon the cars for a temporary purpose and without any intention of paying fare or taking passage, are not passengers: *Ramsey v. Metropolitan St. R. Co.*, 157 Mo. 477, 57 S. W. 268; *Padgett v. Moll*, 159 Mo. 143, 81 Am. St. Rep. 347, 60 S. W. 121, 52 L. R. A. 54; *Duff v. Allegheny V. R. R. Co.*, 91 Pa. St. 458, 36 Am. Rep. 675.

IX. After Leaving the Car.

The instant a passenger steps or frees himself from the car on which he has been riding, he, for most purposes, ceases to be a passenger. "The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from a car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk. When a common carrier has exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or leave a train have the relation and rights of passengers, in leaving or approaching cars at a station. But one who steps from a street railway car to the street is not upon premises of the railway company, but upon a public street, where he has the same rights as every other occupier, and over which the company has no control. His rights are those of a traveler upon a highway, and not of a passenger": *Creamer v. West End St. Ry.*, 156 Mass. 320, 32 Am. St. Rep. 456, 31 N. E. 391, 16 L. R. A. 490; *Gargan v. West End St. Ry. Co.*, 176 Mass. 106, 79 Am. St. Rep. 298, 57 N. E. 217, 49 L. R. A. 421. Where, however, a railroad company is operating other lines and cars than that on which the passenger has ridden, it is, of course, its duty to exercise a high degree of care to avoid injuring him by them or any of them, and until he has passed those probable dangers, he may still be regarded, for the purposes of his protection, as a passenger: *Burbridge v. Kansas City Ry. Co.*, 36 Mo. App. 600.

COMMONWEALTH v. ANSELVICH.

[186 Mass. 376, 71 N. E. 790.]

CONSTITUTIONAL LAW.—A Statute Forbidding and Imposing a Penalty for the Use of and Sale of Registered Bottles without the written consent of the person whose name appears thereon, unless purchased from him, is not unconstitutional. (p. 591.)

CONSTITUTIONAL LAW.—Statute Making Certain Acts Prima Facie Evidence of Crime.—A statute making the possession by an agent or dealer without the written consent of or purchase from the owner of bottles registered and distinguished by a name prima facie evidence of a violation of such statute is not unconstitutional legislation nor unconstitutional. (p. 592.)

CONSTITUTIONAL LAW.—Statute Partially Unconstitutional.—If section 18 of the statute of Massachusetts imposing a penalty for the use and sale of registered bottles without the written consent of their owner, unless purchased from him, is unconstitutional, it is not so far essential to the other parts of the act as to affect their validity. (p. 592.)

PRACTICE.—A Motion to Quash a Complaint as Relating to Matters of Form cannot be made for the first time in the superior court to which the case has been appealed from a municipal court. (p. 593.)

CRIMINAL LAW.—Presenting New Ground of Defense.—On a criminal trial in a superior court on appeal from a municipal court the jury may be instructed that they may consider the fact that one branch of the defense introduced in the former court was not presented in the other, if they are also told that the defendant may have refrained on the ground of policy from putting in his whole defense, and that, unless they are satisfied that the defendant had the evidence in his possession at the time and would have put it in at the trial in the lower court if it had been true, no inference should be drawn against him from his failure to introduce it there. (p. 593.)

Complaint in a municipal court of the city of Boston charging the defendant with the illegal use and sale of certain registered bottles in violation of section 16 of chapter 72 of the Revised Laws of Massachusetts. He was found guilty and appealed to the superior court, where he was again tried. In that court a motion was made to quash the complaint, but was denied by the judge. A verdict of guilty was returned by the jury, and the defendant alleged exceptions.

J. W. Corcoran, W. B. Sullivan and C. W. Ford, for the defendant.

J. D. McLaughlin, second assistant district attorney, for the Commonwealth.

ON, C. J. This is a complaint under the Revised Laws, chapter 72, section 16, charging the defendant with

ing sold, bought, given, taken or otherwise disposed of or
 ticked in certain bottles, marked and distinguished with the
 ne of L. Speidel and Company, as set forth in the complaint,
 ether with the word "Registered," the description of which
 ne, mark and device had previously been duly and legally
 d and published. The principal contention of the defend-
 is that the statute under which the complaint was made is
 constitutional.

This statute appears to have three objects, of which one is to
 protect the public from fraud and deception by preventing the
 authorized use, a second time, of vessels or receptacles origi-
 ally marked in such a way as to indicate their contents together
 with the source from which they came; another is to protect the
 manufacturer or dealer from loss or profits or reputation by the
 unauthorized use of his property to deceive the public by a sale
 of an inferior article in such a manner as to indicate that it was
 manufactured or put up by him; and the third is to aid the
 manufacturer or dealer in protecting and preserving a kind of
 property, ³⁷⁸ which, from its nature and use, is peculiarly
 liable to be misappropriated by careless or dishonest persons.
 These are proper objects of legislation, which have been recog-
 nized in our statutes for many years: Stats. 1850, c. 90, secs.
 1, 2; Stats. 1852, c. 197; Stats. 1853, c. 156, sec. 1; Stats. 1870,
 c. 340; Rev. Stats., c. 28, sec. 132; Gen. Stats., c. 49, sec. 117;
 Gen. Stats., c. 56, sec. 3; Gen. Stats., c. 161, secs. 55, 56; Pub.
 Stats., c. 76, secs. 3-6; Pub. Stats., c. 203, secs. 63, 64; Rev.
 Laws, c. 72, secs. 2, 3, 5, 10, 12. Unless this statute violates
 the constitution in the nature of its provisions, or in the methods
 which it prescribes to accomplish the objects of the legislature,
 it must be sustained. We see nothing in it that transcends the
 power of the legislature in these particulars. The means pro-
 vided are reasonably adapted to the ends in view. The statute
 does not apply to any case in which there has been a purchase
 from the owner of the registered receptacle, and it properly for-
 bids the defacement, or use, or sale of the receptacle without the
 written consent of the owner, in all cases in which there has been
 no purchase by anyone from him.

The defendant contends that the statute improperly gives ad-
 vantages to certain classes of persons, which others do not have.
 In this he is mistaken. It makes provisions in reference to a
 kind of property, used in a peculiar way, which is of such a na-
 ture as to call for peculiar provisions for the protection of the
 public and of its owners against the fraud of evildoers.

too, the provisions making possession by an agent or dealer, without the written consent of or purchase from the owner, prima facie evidence of a violation of the statute, is not class legislation. The peculiar conditions referred to in this part of the statute have such a probable connection with the commission of the offense, that the legislature well may legislate in reference to them. It is not persons who are particularly dealt with in the statute, but the conditions which pertain to their occupation and business. It is in the power of the legislature to make certain conditions prima facie evidence of the commission of a crime, and this is a common kind of legislation: *Commonwealth v. Williams*, 6 Gray, 1; *Holmes v. Hunt*, 122 Mass. 505, 518, 23 Am. Rep. 381; *Commonwealth v. Hall*, 128 Mass. 410, 35 Am. Rep. 387; *Commonwealth v. Barber*, 143 Mass. 560, 10 N. E. 330; *Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, 52 N. E. 389. It cannot be said that the conditions referred to in ³⁷⁹ this statute are so foreign to probable guilt as to furnish no justification for the legislative enactment that they shall be deemed prima facie evidence of guilt.

Statutes having some of the features of this act as to the protection of trademarks have been upheld by this court: *Commonwealth v. Rozen*, 176 Mass. 129, 57 N. E. 223; *Tracy v. Banker*, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508; *Gilman v. Hunnewell*, 122 Mass. 139; *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 37 Am. Rep. 362.

The case of *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759, arose under a statute whose language is almost identical with the language of this, as found in the original enactment in the Statutes of 1893, chapter 440, and the court, in an elaborate opinion, unanimously held the law to be constitutional. Decisions in *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007, 52 L. R. A. 283, and *Horwich v. Walker-Gordon Laboratory Co.*, 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938, declaring similar statutes unconstitutional, are not in harmony with the cases in this commonwealth. It is clearly the opinion that the parts of the statute involved are constitutional. Without intimating that there is a different conclusion in regard to section 18 of the act (*Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, 52 N. E. 389) it is enough to say as to this part of the act that it is not involved in the present case, and that it is not essential to the other parts of the act that its constitutionality, if it were unconstitutional, would affect

their validity: *Commonwealth v. Petranich*, 183 Mass. 217, 66 I. E. 807; *Edwards v. Bruerton*, 184 Mass. 529, 69 N. E. 328.

The second part of the motion to quash, which relates to matters of form, not having been made in the lower court, comes too late and need not be considered: *Rev. Laws*, c. 219, sec. 21; *Commonwealth v. Reid*, 175 Mass. 325, 56 N. E. 317.

The defendant objected to evidence of the filing and publication of the description of the name used by L. Speidel and Company, because it was done about January 17, 1900, before the enactment of the Revised Laws under which the complaint was made. The answer to this objection is that the filing and publication were done pursuant to the Statutes of 1893, chapter 440, section 1, which was repealed by the Revised Laws, chapter 227, but was embodied in substance in the Revised Laws, chapter 72, section 15. It is provided by the Revised Laws, chapter 226, section 2, that: "The provisions of the Revised Laws, so far as they are the same as those of existing statutes, shall be construed as a continuation ³⁸⁰ thereof and not as new enactments." So, also, section 4 of this chapter provides that the repeal of a law by the chapter "shall not affect any act done, ratified or confirmed, or any right accrued or established . . . before the repeal takes effect," etc.: See, also, *Rev. Laws*, c. 226, secs. 5, 6. The evidence was rightly admitted.

The defendant also objects to that part of the charge in which the judge instructed the jury that they might consider the fact that one branch of the defense introduced at this trial was not presented at the trial in the lower court. This instruction was carefully guarded. The jury were shown that a party might, on grounds of policy, refrain from putting in his defense, or a part of his defense, in the lower court, and that in such a case no inference could be drawn against him from his failure to put it in. They were told that unless they were satisfied that the defendant had the evidence in his possession at the time, and would have put it in at the trial in the lower court if it had been true, no inference should be drawn against him from his failure to introduce it there. There was no error in the instruction: *Commonwealth v. Goldstein*, 180 Mass. 374, 91 Am. St. Rep. 311, 62 N. E. 378.

Exceptions overruled.

A Statute of New York similar to the one involved in the principal case is upheld as valid in *People v. Cannon*, 139 N. Y. 3⁵ Am. St. Rep. 668, but an Illinois statute of like import is pronounced unconstitutional in *Horwich v. Walker-Gordon etc. Co.*, 205 Ill. 98 Am. St. Rep. 254.

PAUL v. FIDELITY AND CASUALTY COMPANY.

[156 Mass. 413, 71 N. E. 801.]

INSURANCE—Failure to Sue within the Time Required in the Policy, whether Excused by an Injunction.—Where a policy insuring against death by accident provides that legal proceedings to recover thereunder must be brought within six months from the time of death, an action brought after that time cannot be sustained on the ground that an injunction issued after the time began to run prevented the beneficiary from maintaining suit, especially if the injunction was dissolved before the six months expired, leaving a short, but sufficient, time, in which to bring action. (pp. 596, 597.)

INSURANCE Against Death by Accident.—The Failure to Sue within the Time Prescribed in a policy insuring against death by accident cannot be excused on the ground that the persons entitled to sue did not know of the limitation of time contained in the policy. p. 597.

INSURANCE Against Death by Accident—Estoppel to Rely on Provision Prescribing Time After Which Suit cannot be Brought. The fact that an insurer against death by accident in various negotiations with and communications to persons entitled to maintain an action on the policy did not call their attention to the provision therein limiting the time within which action thereon might be brought did in any way indicate that reliance would be brought on such provision, is not a waiver thereof, nor does it create any estoppel against subsequent reliance on it. (pp. 597, 598.)

G. W. Bush, for the defendant.

F. T. Renner, S. H. Foster and F. Paul, for the plaintiff.

414 MORTON, J. This is an action of contract to recover the sum of five thousand dollars upon an accident policy issued by the defendant, a corporation organized under the laws of the state of New York, to one Charles F. Paul, who died May 29, 1902, as the result of accidental injuries received a few days previously. The policy is payable to Carrie V. Paul, the plaintiff, and the action is brought by a receiver in her name for his benefit. The case comes here on a report by the presiding justice after a refusal to rule, as requested by the defendant, that there was no evidence of waiver on its part of the terms of the policy, and a finding and judgment in favor of the plaintiff. If the plaintiff is right, the judgment is to be affirmed; otherwise, it is to be entered as law and justice may

provided amongst other things that proof of death furnished to the company within two months from death," and that "legal proceedings for recovery

ereunder may not be brought till after three months from the date of filing proofs at the company's home office, nor brought at all unless begun within six months from the time of death. . . . Claims not brought in accordance with the provisions of his ⁴¹⁵ paragraph will be forfeited to the company." The writ in this case is dated July 18, 1903. Due proof of the death of the insured was filed at the home office of the company in New York on July 7, 1902, and no question arises as to that. On the twenty-sixth day of June, 1902, Jennie I. Paul, the widow of the insured, filed a bill in equity in the superior court against the beneficiary named in the policy, the present plaintiff, alleging that the only interest which the beneficiary had in the policy was that of pledgee, and offering to pay what was due, and to redeem the policy, and praying for an injunction to restrain her from selling or assigning the policy, and from instituting or prosecuting any suit against the company or receiving any money payable under the policy. An injunction was issued as prayed for on the next day, June 27th, and notice thereof sent to the defendant. On November 26, 1902, a final decree was entered in the equity suit in favor of the plaintiff in that suit, Jennie I. Paul. An appeal from this decree was taken on December 1, 1902, by the defendant, the present plaintiff, which was waived by agreement of the parties about a year afterward, and a rescript was sent down from the full court ordering the decree to be affirmed. The proceedings in regard to the appeal do not seem to us to have any bearing on the questions now in issue. In April, 1903, on application of the widow, the plaintiff in the equity suit, two receivers were appointed in that suit to receive the money due on the policy. For some reason which does not appear, they were not authorized to sue and collect what was due, but only to receive what was due. Subsequently, also on application of the plaintiff in that suit, one of the receivers having resigned, full authority in the premises was granted to the remaining receiver, and on July 18, 1903, as already stated, this action was brought by him in the name of the beneficiary for his benefit.

The defense is that the action was not brought within the time limited in the policy. And it is clear that it was not. But the plaintiff contends that the injunction operated to excuse her from the effect of the limitation contained in the policy, and, if it did not, that the conduct of the defendant has been such as to warrant a finding that it has waived the provision, or estopped to set it up. We do not think that either content is well taken.

⁴¹⁶ Though this action is brought by the receiver in the name of the beneficiary, it is, in effect, prosecuted for the benefit of the widow. But it is manifest that neither she nor the receiver can stand in any better position than the party to whom by its terms the policy is made payable, except that, possibly, a waiver to the widow might inure to the benefit of the plaintiff: *Jennings v. Metropolitan Ins. Co.*, 148 Mass. 61, 66, 18 N. E. 601. It is well settled that the limitation named in the policy is a good one, and is binding on the insured: *Lewis v. Metropolitan Ins. Co.*, 180 Mass. 317, 62 N. E. 369. The plaintiff indeed does not contend that it is not. As a general rule, when the period of limitation prescribed by statute has begun to run, it will continue to run unless the case is brought within one or more of the exceptions provided by the statute. We do not see why the same rule should not apply to limitations by contract: *Wilson v. Aetna Ins. Co.*, 27 Vt. 99. In some states the time during which an injunction is in force restraining the bringing of an action is excepted by statute from the time limited for the commencement of the action: *Wood's Limitation of Actions*, sec. 243. There is no such statute in this state. Whether if there were it would apply to limitations by contract might admit of question: *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, 391, 19 L. ed. 257; *Wilkinson v. First Nat. Ins. Co.*, 72 N. Y. 499, 28 Am. Rep. 166; *Hamilton v. Royal Ins. Co.*, 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301. It is not necessary, however, to consider that question now, since neither the policy nor, as already observed, the statutes of this commonwealth contain any exception or provision in regard to the effect of an injunction upon the limitation of actions. If there is no exception in the policy providing for such a case, and no provision in the statute, it is difficult to understand how an injunction, issued after the time limited in the policy had begun to run, can operate to prevent the limitation from taking effect, and it was so held in regard to a similar stipulation in a policy of insurance in *Wilkinson v. First Nat. Ins. Co.*, 72 N. Y. 499, 28 Am. Rep. 166. The plaintiff contends that what is said in that case in regard to the effect of an injunction upon the limitation named in the policy is obiter, and that it has been modified, if not overruled, by a later decision in *Hamilton v. Royal Ins. Co.*, 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485. But all that was decided was that a statutory provision in regard to the commencement of actions operated to save an action begun

in accordance with it from the effect of a limitation created by contract as well as a limitation created by statute. To that extent it may have modified or overruled the statement in the opinion in *Wilkinson v. First Nat. Ins. Co.*, 72 N. Y. 499, 28 Am. Rep. 166, that the provision in the statutes of New York saving the rights of parties stayed by injunction had no application where the limitation was prescribed by the contract of the parties. The general reasoning of the court in *Wilkinson v. First Nat. Ins. Co.*, 72 N. Y. 499, 28 Am. Rep. 166, as to the effect of an injunction upon a limitation by contract remains unaffected, we think, and seems to us more satisfactory than that in *Jackson v. Fidelity etc. Co. of New York*, 75 Fed. 359, 21 C. C. A. 394, where the decision was by a divided court, and in *Earnshaw v. Sun Mutual Aid Soc.*, 68 Md. 465, 6 Am. St. Rep. 460, 12 Atl. 884, relied on by the plaintiff. In the latter case the court sought to apply to the case before it the principle laid down in *Semmes v. Hartford Ins. Co.*, 13 Wall. 158, 20 L. ed. 490, where the supreme court of the United States held that a provision similar to that which we are considering did not operate in case of war between the countries of the contracting parties. But it is manifest that the circumstances of that case were entirely different from the circumstances of this. Application could have been made to the court at any time by any of the parties interested for the appointment of a receiver, and such a modification of the injunction as would allow him to bring suit on the policy, and the injunction would no doubt have been modified and a receiver appointed as was finally done. Moreover, the final decree in the equity suit was entered before the six months expired, and the time which elapsed between the date of its entry and the expiration of the six months, though short, was a sufficient time in which to bring suit. It is no excuse for the widow or the receiver to say that they did not know of the provision in relation to the bringing of an action. For aught that appears a copy of the policy could have been procured at any time. Furthermore, the plaintiff is chargeable with knowledge of the contents of the policy, and, as already observed, so far as the present suit is concerned, the receiver and the widow can stand in no better position than the plaintiff. Whether equity could or would ⁴¹⁸ afford relief from the forfeiture incurred by the failure to bring an action within the time limited in the policy, it is not necessary now to consider. We do not mean to intimate that it could or would. If an action at law and the pleadings do not raise any q

of the case of *Benjamin v. Hotel Reynolds Co.*, 101 Mass. 100, 101, 102, and the principle invoked by the court in that case is not applied by its interposition in this case. It is not intended by the defendant to deprive the plaintiff of a remedy at law. It will give him a remedy at law, but the remedy at law is not applicable: *Benjamin v. Hotel Reynolds Co.*, 101 Mass. 100, 101, 102; *Phibney v. Warren*, 101 Mass. 100, 101, 102, 103, 104.

The court further contends that the defendant is estopped from asserting its right to rely upon the limitation contained in the policy, and that it is not in a position to waive the right to do so. The court in this case is based on, in substance, that in the insurance and communications between the plaintiff and the widow and the receiver and a third party, the defendant in regard to the controversy which had arisen between the plaintiff and the widow, neither the company nor its agents at any time called the attention of the plaintiff or the widow or the receiver or their counsel to the limitation contained in the policy. It is contended that they should have done so, and that the first notice that the plaintiff or the widow or the receiver or their counsel had that the defendant intended to rely upon the limitation contained in the policy, was the filing of the answer. Special pleading is placed upon the fact that in November 17, 1902, the defendant was informed by the attorney for Jennie L. Paul, that the equity suit was to be tried on the following Monday, November 17th, and that it must have known as the plaintiff's counsel that it was impossible to bring the case to an end before the limitation expired, which was November 17th, but the defendant kept silent and on the further fact that when the receiver made demand in May, 1903, the defendant refused to pay, and further said that, under the decree appointing the receiver, the latter had no power to compel payment. But the defendant owed no duty and was under no obligation to the plaintiff or to Jennie L. Paul, or to the receiver, to call their attention to that of their counsel to the provision in the policy in regard to the limitation of actions. It had a right to assume that the parties were cognizant of it, and would pay the debt or not. It gave no assurances to any of the parties that it would not rely upon it, and it held out no inducements to them to delay. It was not a party to the equity suit, and the communication voluntarily made to it on November 15, 1902, that the equity suit was to be tried on

the following Monday imposed on it no duty to inform him of the provision, or of its purpose to rely upon it, and in the absence of any such duty its silence cannot be construed as a waiver of the provision or as estopping it from relying upon it. What took place in May, 1903, was long after the time limited for the commencement of an action had expired. The fact that the defendant coupled with its refusal to pay an objection that the receiver could not compel payment cannot be regarded as a waiver of the limitation, or as estopping the defendant from taking advantage of it. It was none the less a refusal on whatever ground it was put. And even if we assume that it was put on the ground that the receiver had no power to compel payment, neither the plaintiff nor the receiver nor the widow were in any manner prejudiced or misled thereby, as might perhaps have been the case, if it had happened before the time for bringing the action had expired: See *Cook v. North British etc. Ins. Co.*, 181 Mass. 101, 104, 62 N. E. 1049; *Rooney v. Maryland Casualty Co.*, 184 Mass. 26, 67 N. E. 882.

We think that the ruling requested should have been given and that judgment should be entered for the defendant.

So ordered.

The Parties to a Contract of Insurance may limit the time within which an action thereon may be brought: *McFarland v. Railway etc. Assn.*, 5 Wyo. 126, 63 Am. St. Rep. 29. And the limitation is binding, according to *Mead v. Phoenix Ins. Co.*, 68 Kan. 432, ante, p. 412, against minor beneficiaries.

CASES

IN THE SUPREME COURT

OF MICHIGAN.

CITY OF DETROIT & DETROIT RAILWAY COMPANY.
(24 Mich. 11, 96 N. W. 932.)

LAW. Practical Interpretation of, When Binding.—A long continuing practical interpretation of a law by the courts of the state should be regarded as binding. (p. 612.)

JURORS. Jurors of as Citizens of a Municipal Corporation.—The jurors of a city as a citizen and taxpayer of a municipal corporation is not sufficient to qualify him in a civil action to which the city is a party. (p. 612.)

MUNICIPAL CORPORATION.—Street Railway.—Ordinance of, When Not Ultra Vires.—An ordinance of a municipal corporation requiring it to lay down a concrete foundation under a street railway track is not ultra vires. (p. 622.)

RES JUDICATA.—Judgment Between Different Parties.—A judgment in an action by a taxpayer against a city board of public works in which it is enjoined from placing a concrete foundation under a street railway is not admissible in a subsequent action between the municipality and the railway to establish that the ordinance requiring the city to do such work is ultra vires, because the parties to the two actions are different. (p. 603.)

ACCORD AND SATISFACTION.—If, in a settlement between parties, a claim made by one of them is wholly disallowed, such disallowance is conclusive. (p. 613.)

STREET RAILWAYS, Right of to Materials Removed from the Public Streets.—If a street railway company tears up a public street for the purpose of laying its track, it is entitled to use the material so removed by it in performing its duty in placing the street in the condition required by the municipal ordinance, and the city is liable if it removes such material. (p. 603.)

Action by the city of Detroit to recover for work done and materials furnished by it to the defendant and for the expense of supervision of certain work. In April, 1896, an adjustment of the question was made between the plaintiff and the

defendant showing that the latter owed to the former nearly twenty-three thousand dollars, of which the defendant agreed to pay twelve thousand dollars, but desired the balance to remain until it could present a counterclaim for concreting under the tracks. This claim was based on an ordinance of the plaintiff, which, among other things, provided that as to six inches of concrete on which ties were required to rest, the expense should be borne by the municipality. In addition to the demands founded on the claim of concreting there was also one for materials which it was claimed the board of public works of the plaintiff took away from the street, thereby preventing the defendant from using such material in reconstructing its pavement and restoring the street to order. The trial court ruled against the defendant as against both claims, and a verdict was found for the plaintiff without making any allowance for them. The defendant brought error.

Corliss, Andrus & Leete and John J. Speed, for the appellant.

Timothy E. Tarnsney and Albert B. Hall, for the appellee.

¹³ MONTGOMERY, J. A question of great importance to practitioners was presented on the trial of this case. A number of the jurors called in the case were taxpayers in the city of Detroit. They were challenged for cause on the ground of interest. Were they competent jurors? There is no statute of this state to which our attention has been directed which, with respect to this case, modifies the common-law qualifications of jurors. It is provided by section 1026 of 3 Compiled Laws that, "in penal actions for the recovery of any sum, it shall not be a good cause of challenge that a juror is liable to pay taxes in any county, city, village, township or district which may be benefited by such recovery"; and by section 2468 of 1 Compiled Laws, it is provided that, "on the trial of every action in which a county shall be interested, the electors and inhabitants of such county shall be competent witnesses and jurors." No similar provision is found affecting the common-law qualifications of jurors in suits where cities or townships are parties. In *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368, we held that since the enactment of section 2468 of 1 Compiled Laws, a taxpayer of a county is a competent juror in an action to which the county is a party; but this holding ¹⁴ does not relieve the difficulty in the present case. The question here is as to the competency of these ju

at common law. The authorities are not agreed. A number of cases, and perhaps numerically the weight of authority, sustain the contention of appellant's counsel. But there are not wanting cases which hold that the interest of a taxpayer in a municipality is not sufficient to exclude him upon the ground of interest: See *Kemper v. City of Louisville*, 14 Bush, 94; *City of Marshall v. McAllister*, 18 Tex. Civ. App. 160, 43 S. W. 1043; *City of Dallas v. Peacock*, 89 Tex. 58, 33 S. W. 220; *Rathbun v. Thurston County*, 8 Wash. 238, 35 Pac. 1102; *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324; *Eastman v. Commissioners of Burke County*, 119 N. C. 505, 26 S. E. 39; *City of Omaha v. Cane*, 15 Neb. 657, 20 N. W. 101; *City of Omaha v. Olmstead*, 5 Neb. 453; *Commissioners of Clermont County v. Lytle*, 3 Ohio, 289. The practice in this state, so far as we are advised, is in line with the authorities cited. A significant fact is that section 1109 of 1 Compiled Laws excludes judges from sitting in cases on the same ground that jurors are excluded; and yet, so far as we are advised, the uniform practice both at the circuit and in this court, during the entire judicial history of the state, has been for judges to sit in cases involving the rights of municipalities in which the presiding judge is a taxpayer. This has been true both as to the circuit and the supreme court during its entire history; and this long-continued practical interpretation of the law should be deemed, as we think, controlling. There was, therefore, no error in permitting these jurors to sit.

As to the claim of defendant for materials removed, it is not clear that they were not considered as in part compensation for the work done by the board of public works.

The important question in the case is as to the right of the defendant to demand compensation for concrete placed under the ties in laying the tracks of the road in unpaved streets. That it was the duty of the city, under the ordinance, ¹⁵ to put down this concrete, is clear; but it is contended that this provision of the ordinance was ultra vires. This contention is answered by the mandamus case between these same parties, decided at the present term: *City of Detroit v. Detroit Ry. Co.*, 133 Mich. 608, 95 N. W. 736.

It is said in the brief of plaintiff's counsel that this question is res adjudicata. It appeared on the trial that a taxpayer had at one time procured a temporary injunction against the city or the board of public works, restraining the work of concreting. The record of that case is not in evidence, although

it appears that the circuit judge was of the opinion that the contract was ultra vires. Apart from the fact that the record does not disclose that that case ever passed to decree, the fact that defendant was in no way a party to the record is a sufficient answer to the contention that the holding of the circuit judge in that case is a controlling determination of the present.

For the error pointed out, the judgment will be reversed, and a new trial ordered.

The other justices concurred.

SUPPLEMENTAL OPINION.

MONTGOMERY, J. Reference is made to the decision of this case, reported supra. It is said in the decision, in substance, that, as to the claim of defendant for materials removed by the city, it is not clear that this claim was not considered and adjusted by the parties; but, as the opinion leaves undecided the question of liability in case the jury should find that this item was not adjusted, the parties have stipulated that this question should be considered by the court, and an announcement made for the guidance of the court on a new trial.

The testimony is conflicting upon the question whether in the adjustment of May 14, 1896, when an agreement was reached as to the amount due the city, a claim for such material was put forward and considered. This was a question of fact. If such a claim was made, even though it was totally disallowed, yet, in view of the fact that other ¹⁶ deductions and concessions were made by the city, we agree with the circuit judge that the settlement then made concluded the defendant.

If no settlement of this item was made, the question presented is this: Whether, when the defendant was engaged in tearing up the pavement or surface of the street for the purpose of laying the track, it was entitled to use the material thus torn up in putting the street in the condition required by the ordinance, so far as the same was suitable to the purpose, and whether the city was liable for such material removed by its authority while the replacing of the pavement was in progress. We think the answers to these questions should be in the affirmative. We can see no good ground for saying that the ordinance contemplated that the old material which was entirely suitable for use should be replaced with new. This was not the contract.

It is now said that the claim had not been presented to the common council for allowance, and that this will afford a complete answer to the defendant's claim on a new trial. The record does not show that this question was raised on the former trial, and need not now be considered.

The case will be remanded for trial.

The other justices concurred.

The Competency as a Juror of a citizen and taxpayer of a municipality in an action in which the municipality is a party is considered in the monographic note to *Commonwealth v. Brown*, 9 Am. St. Rep. 750-752.

A Judgment, to be Evidence against a party in another suit upon a different cause of action, must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases, and must have been determined upon the merits in the first action: *City of Richmond v. Sitterding*, 101 Va. 354, 99 Am. St. Rep. 879. See, too, *Brack v. Boyd*, 211 Ill. 290, 103 Am. St. Rep. 200; *Niekum v. Burckhardt*, 30 Or. 464, 60 Am. St. Rep. 822.

Accord and Satisfaction is the subject of an extended note to *Harrison v. Henderson*, 100 Am. St. Rep. 390-456.

BLUMENTHAL v. BERKSHIRE LIFE INSURANCE CO.

[134 Mich. 216, 96 N. W. 17.]

LIFE INSURANCE.—The Representation in an Answer for Life Insurance that the Applicant is in Good Health or that he has not been subject to illness means that he has not suffered illness of a serious nature tending to undermine his constitution, and that his state of health is free from disease that affects the general soundness or healthiness of the system. (p. 605.)

INSURANCE, LIFE.—The Representation in an Application that the Applicant Has not Been Attended by a Physician nor consulted one previously is not false if the applicant merely omits to state a treatment for some temporary indisposition. (p. 606.)

INSURANCE, LIFE.—In an Application for Life Insurance the Words "Chronic or Persistent" do not differ materially from "chronic and persistent." (p. 606.)

Assumpsit on a policy of life insurance. Judgment for the plaintiff and the defendant brought error.

F. L. Snodgrass and T. A. E. and J. C. Weadock, for the appellant.

Ross & Harris and Simonson, Gillett & Clark, for the appellees.

²¹⁷ MONTGOMERY, J. This is an action on an insurance policy issued on the life of Nicholas I. Blumenthal. The defense interposed was false representations and warranties made by the insured in his application for the policy. The particular questions claimed to have been falsely answered, together with the answers given in the application, were the following:

"No. 15. Have you ever had chronic or persistent cough or hoarseness? A. No.

"No. 16. State particulars of any illness, constitutional disease, or injury you have had, giving date, duration, and remaining effects, if any. A. No disease or illness of any kind.

"No. 17. When did you last consult a physician? A. About a year ago. Q. For what? A. Cold and cough. . . .

"No. 21. Give names and addresses of physicians who have attended you? A. C. L. Nauman, M. D., West Branch, Michigan."

It is argued at length by counsel for the defendant that the evidence conclusively shows that the insured was suffering from a chronic and persistent cough for a considerable period before the application; that he had, within the period of a year, consulted physicians other than Dr. Nauman; and that his answers to each of these questions were shown to be untrue.

It would not be of profit to set out at length the testimony bearing upon the question as to whether the ailments which the insured is shown to have had were such ailments or diseases as to seriously affect the general soundness and healthiness of the system, or whether, on the other hand, it was a mere temporary indisposition, not tending to undermine the constitution of the insured. An examination of the record discloses that this question of fact was ²¹⁸ sharply controverted at the trial, and that there is abundant evidence that, on the occasions when the insured had consulted physicians, the trouble under which he was laboring was temporary, and yielded to treatment. The law is settled that in a representation, contained in an application for insurance, that the insured is in good health, or that he has not been subject to illness, or that he has not been attended by a physician or consulted one professionally, the answer is to be construed as meaning, in the one case, that he has not suffered an illness of a serious nature, tending to undermine the constitution, and that a state of health is freedom from disease or ailment that affects the general soundness or healthiness of the system seriously. And as to representations as to

employment by others here, the omission to state a treatment by a physician for some temporary indisposition does not avoid the policy. See *Barber v. Metropolitan Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 884, 18 N. W. 611; *Pudritzky v. Supreme Lodge A. O. U. W. M.*, 43 Mich. 438, 43 N. W. 373; *Hann v. National Union F. M.*, 51 Mich. 311, 37 Am. St. Rep. 365, 56 N. W. 516; *Barber v. First Mut. Life Ins. Co.*, 105 Mich. 94, 65 N. W. 511; *Barber v. Modern Woodmen of America*, 126 Mich. 161, 81 N. W. 471; *Consolidated Mut. Life Ins. Co. v. Trust Co.*, 122 U. S. 350, 3 Sup. Ct. Rep. 119, 23 L. ed. 708.

Following this line of cases, the circuit judge charged the jury as follows: "Now, as I said to you, it is not the duty of an agent and for insurance to advise the insurance company of every time he consults a physician for some temporary indisposition; but it is his duty to advise them, in answer to that question every time that he has consulted a physician relative to any serious ailment, such as I have spoken of; and, if you find that the disease with which Nicholas I. Blumenthal was then suffering was such a disease as would affect his general health, then it would be his duty to have advised the company that he had been attended by Dr. Winter."

Error is assigned upon this instruction, but we think it was clearly within the rule as above laid down.

219 Error is assigned upon a portion of the charge in which the circuit judge referred to question No. 15, above quoted, and stated the question which was asked to have been, "Have you ever had chronic and persistent hoarseness?" It is argued that the substitution of the word "and" in place of the word "or" in the question as put to the applicant changed the sense of the question, and an effort is made to show some marked distinction between the words "chronic" and "persistent," as used in this sentence. We think the effort has not been marked with success. The word "or" is not always disjunctive. It is sometimes interpretative or expository of the preceding word. So, it is often used in the sense of "to wit," "that is to say." We think it was so used in this sentence, and that, as used in this connection, the two words are or were intended to be used in the same sense, the word "chronic" being defined, in effect, as meaning "persistent": See 21 Am. & Eng. Ency. of Law, 2d ed., p. 936, and cases cited in note 5; *Powell v. Race Course Co.*, L. R. 39 Q. B. Div. 242.

Other errors are assigned, all of which have been considered, but, except as they are covered by the foregoing discussion, we do not find that they call for further consideration.

We are satisfied that no substantial error was committed to the prejudice of defendant, and the judgment will be affirmed, with costs.

The other justices concurred.

As to the Meaning of a Representation in an application for life insurance that the applicant is of sound health or good health, see *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894; *Maine Ben. Assn. v. Parks*, 81 Me. 79, 10 Am. St. Rep. 240, and note; note to *Continental Life Ins. Co. v. Yung*, 3 Am. St. Rep. 634; and as to the meaning of a representation that the applicant has not consulted a physician or has not been attended by one, see *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894; *Cobb v. Covenant Mut. Ben. Assn.*, 153 Mass. 176, 25 Am. St. Rep. 619; *Hann v. National Union*, 97 Mich. 513, 37 Am. St. Rep. 365; note to *Continental Life Ins. Co. v. Yung*, 3 Am. St. Rep. 637. On the effect of false answers by the applicant as to specific diseases, see *March v. Metropolitan Life Ins. Co.*, 186 Pa. St. 629, 65 Am. St. Rep. 887, and cases cited in the cross-reference note thereto.

OLIVIER v. HOUGHTON COUNTY STREET RAILWAY COMPANY.

[134 Mich. 367, 96 N. W. 434.]

ACTIONS—Death, When Immediate.—One who, being injured, survives in a comatose and unconscious condition until the following day, does not die instantly, and the action must be brought under the survival act and not under the death act. (p. 608.)

DAMAGES in Actions for Causing Death.—In an action brought by an administrator under the survival act for injuries to and the consequent death of his intestate, the plaintiff is entitled to recover as damages for loss of the earnings of the decedent for the period during which he would have lived but for the injury, and is not restricted to the period between such injury and the death due thereto. (pp. 608, 609.)

Action by the administrator of Cyrille Boivin for injuries to plaintiff's intestate resulting in his death. Judgment for the plaintiff from which the defendant brought error.

W. A. Burritt, for the appellant.

Gray, Haire & Stone, for the appellee.

³⁶⁷ **HOOVER, C. J.** The plaintiff's intestate was injured, while riding in a wagon, through a collision with a street-car. He was rendered unconscious, in which condition he remained until his death upon the succeeding day. The declaration con-

tained four counts, two under what has been termed the "death act," and two under the "survival act." One of each charged "gross negligence." It was not claimed that the deceased was chargeable with contributory negligence. Upon the undisputed fact that deceased lived until the following day, the court held that ^{see} the death was not instantaneous, and excluded testimony under the counts based on the death act, and subsequently counsel abandoned the count charging gross negligence under the survival act. A verdict and judgment for the plaintiff for four dollars was rendered, and the plaintiff has brought error.

The appellant's counsel raises two questions: 1. Whether he was entitled to recover under the death act; 2. Whether the court erred in his instructions upon the measure of damages.

We see no reason for splitting hairs as to what is meant by instantaneous death, though we can appreciate the difference between a continuing injury resulting in drowning, or death by hanging, throwing from a housetop, etc., and one where a person survives the wrongful act in an injured condition. There is no occasion for saying that one dies instantly because such survival is accompanied by a comatose condition, or unconsciousness, or insanity, or idiocy. The law draws no such distinction between the normal and abnormal, or the rational and irrational. Either has a right of action. In some cases the intervention of a next friend is necessary, but that makes no difference: See 8 Am. & Eng. Ency. of Law, 2d ed., 866; and see, also, *Kellow v. Iowa Cent. Ry. Co.*, 68 Iowa, 470, 56 Am. Rep. 858, 23 N. W. 740, 27 N. W. 466, where it was held that survival of the injury for a moment is sufficient to permit the cause of action to vest and survive. This case is said to overrule the case of *Sherman v. Western Ry. Stage Co.*, 24 Iowa, 515, cited in our case of *Sweetland v. Chicago etc. Ry. Co.*, 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568. We passed upon the question in the case of *Dolson v. Lake Shore etc. Ry. Co.*, 128 Mich. 444, 87 N. W. 629. This action survived, and, under that decision, no right of action under the death accrued.

The court was of the opinion that the damages must be limited to the amount that deceased could have earned during the few hours that he lived after receiving the ^{see} injury. It is but fair to state that this case was heard before the recent case of *Kyes v. Valley Telephone Co.*, 132 Mich. 281, 93 N. W. 3, was decided. That case settled the rule for this state, which was indicated in the *Dolson* case, that, in estimating damages in such a case, it is proper to consider "the earning ability of the injured person, and the length of time that he would

probably have lived had he not been injured, and the loss he sustained by reason of being deprived, by such injuries, of the ability to labor and earn money during the time he probably would have lived had he not been injured."

Counsel for the defendant urge that the damages recoverable in such a case should be only (1) the injury to feelings, pain and anguish of deceased while he actually lived, and (2) the loss of earnings during the remainder of the time that he actually lived. This is an unreasonable limitation. We need not discuss the reasoning by which the result is reached. We have long ago held that prospective damages are recoverable. An injured person may recover for loss of earnings for the period during which the evidence fairly shows that he would have lived but for the injury. This rule would apply to one who should live long enough to try his case, though he should die the following day. But defendant's contention would substitute another rule upon a second trial after his death, should such trial become necessary. Such recovery is based upon the actual damages suffered through the accident. On the first trial the recovery is based upon a probable prospective incapacity for a probable period. After death, such incapacity (and consequent loss) is made certain, where it was only probable before. The period alone remains uncertain. As to pain and mental suffering, it is different. Upon the first trial, the duration of such pain and suffering is uncertain; upon the second, it is definite. As has been already suggested, it is not a new doctrine that prospective damages, when reasonably certain, may be recovered. It is a part of the right that ³⁷⁰ survives under the act, as was held in the Kyes case. Such a construction removes the only objection that can be urged against the view which we have taken of the death act. It gives to the representative the absolute right to the remedy which his ancestor had, instead of leaving it to depend upon the accident of his dependency.

The judgment is reversed and a new trial ordered.

The other justices concurred.

Actions for Wrongful Death where the death is instantaneous, or nearly so, are considered in the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 676, 677. The elements and measure of damages in actions for having caused the death of human beings are considered in the monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375-383, and the recent cases of *St. Louis etc. Ry. Co. v. Haist*, 71 Ark. 258, 100 Am. St. Rep. 65; *Hebert v. Lake Charles Ice etc. Co.*, 111 La. 522, 100 Am. St. Rep. 505.

CASGRAIN v. HAMMOND.

[134 Mich. 419, 96 N. W. 510.]

PERPETUITIES.—Under the statutes of Michigan, the absolute power of alienation cannot be suspended by any condition for a longer period than two lives in being at the death of the last life. (p. 619.)

STATUTES Adopted from Another State, Construed.—When a statute is adopted from another state, the construction previously placed upon it has controlling influence, and the courts will presume that the legislature recognized and adopted such construction. (p. 620.)

PERPETUITIES.—Any Suspension of the Power of Alienation not Based on Lives in Being is void, and that power is not suspended when there are no persons in being by whom an absolute possession can be conveyed. (p. 620.)

PERPETUITIES—Instance of.—If an estate is devised to a woman to be held in trust, to control and pay over the income to her during her natural life, and should she die before the expiration of fourteen years from the execution of the trust, then to divide the income among five designated persons, and, at the expiration of that term, to convey the property to the same persons or to their heirs, of them, which conveyance further declares that it is not to be subject to any claims existing against the grantor and in favor of his creditors for moneys received by the former as their guardian, before any of them can receive a conveyance of the income, and if conveyed to them by the trustee, he must execute a power of sale in favor of all claims against the grantor's estate, this is an attempt to create a forbidden perpetuity, because it is measured by a term of years, and the trustee and the beneficiaries cannot, by joining in the conveyance, give a good title. (pp. 621, 622.)

PERPETUITIES—Effect of Conveyance Attempting to Create a Perpetuity.—If a conveyance attempts to vest an estate in a trustee for a term of years, and then conveyed to specified persons or to the survivor, it must be adjudged void as an attempt to create a perpetuity, and no interest vests in the trustee or the beneficiaries, and, on the death of the grantor, the property attempted to be conveyed must be regarded as belonging to her estate. (p. 622.)

QUIETING TITLE.—One Having Title to Land, but Not in Possession, may maintain a suit to quiet title as against persons claiming under a conveyance which is void, or an attempt to create a forbidden perpetuity. (p. 623.)

Suit by A. H. Casgrain and George H. Lee against Florence F., Florence P., William J., Edward P. and George H. Hammond to set aside a trust deed. The bill was demurred to, the demurrer overruled, and thereupon the defendant

James H. Donnelly & Van De Mark, for the respondents.

vs. A. E. Weadock, for the appellants.

⁴²⁰ MOORE, J. This proceeding was commenced in chancery by filing a bill of complaint, some portions of which read as follows:

"That during her lifetime Ellen Hammond, now deceased, of the city of Detroit, Wayne county, Michigan, acquired the title in fee and was the owner [of real estate, which is described in the bill of complaint], upon which said described lands and premises the said Ellen Hammond caused to be constructed a building costing upward of seven hundred thousand dollars, and was at the time of the death of said Ellen Hammond, and now is, of the value of upward of one million of dollars.

"That on the twentieth day of February, A. D. 1898, the said Ellen Hammond died intestate, leaving no last will, and subsequently William J. Hammond and your oratrix, Annie H. Casgrain, were appointed administrators of the estate, and duly entered upon the performance of their duties as such administrators; that the estate of the said Ellen Hammond has never been closed, nor have the administrators filed their final account or been discharged.

"That the said Ellen Hammond left as her heirs at law George H. Hammond, Charles F. Hammond, William J. Hammond, Florence P. Hammond, Ethel K. Hammond, Edward P. Hammond, and your oratrix, Annie H. Casgrain, all children of the said Ellen Hammond, and your orator George H. Lee, grandchild of the said Ellen Hammond, being a son of Sarah Hammond Lee, who had intermarried with Gilbert W. Lee, and had died prior to the death of Ellen Hammond; and the said heirs at law became entitled in equal proportions to all of the estate of Ellen Hammond, share and share alike.

"That on or about the twelfth day of September, A. D. 1895, the said Ellen Hammond executed to Charles F. Hammond, one of the above-named heirs at law, a warranty deed in form of the lands and premises above described, in which deed the said Charles F. Hammond is described as trustee, and in which said deed the consideration for the conveyance is stated as the sum of one dollar and other considerations, which deed was recorded ⁴²¹ in the office of the register of deeds for the county of Wayne on the first day of October, 1895; and your orators show that, by reason of the recording of said deed as aforesaid in the public records in the office of the register of deeds of Wayne county, the title in fee to said lands appears to be in the said Charles F. Hammond.

"Your grantees further allege that they are informed and believe, and therefore charge the truth to be, that in the lifetime of the said Ellen Hammond, deceased, the lands and premises in the said Charles F. Hammond estate, and they are informed and believe the truth to be that on the same date, and acting with the assent of the said deed to Charles F. Hammond, executed by the said Ellen Hammond, the said Charles F. Hammond executed and delivered an instrument in writing, acknowledged and witnessed, so that the same was to be recorded in the office of the register of deeds for the county of Wayne under the strict requirements of the law which came into force, which said instrument in writing is described as a "Declaration of Trust," by the terms of which the said Charles F. Hammond did thereby declare, as grantee and trustee, that he received and held the lands and premises in trust for the purposes in said declaration of trust named, that is to say, to let, lease, manage and the property according to his best judgment, so as to bring in as large an income as possible, and after paying and meeting the taxes and repairs thereon and expenses in the management, to account and pay over to the said Ellen Hammond, during the term of her natural life, the net income thereof at such times as she might desire for her support and maintenance, and should the said Ellen Hammond die before the expiration of the period of fourteen years from the creation of the trust, then the said net income was to be paid and paid in equal proportions by the said Charles F. Hammond to William J. Hammond, Florence P. Hammond, Ethel K. Hammond, Edward P. Hammond, and the said Charles F. Hammond, and that, at the expiration of the term of the trust stated thereby, he should convey the lands and premises in trust to William J. Hammond, Florence P. Hammond, Ethel K. Hammond, Edward P. Hammond and the said Charles F. Hammond, or to the survivor or survivors ⁴²² of them, in their undivided shares, and that the interest of any one of the persons named, to wit, Charles F. Hammond, William J. Hammond, Florence P. Hammond, Ethel K. Hammond, Edward P. Hammond, who may de cease before the expiration of the trust hereby created, shall pass to and be controlled by the survivor or survivors of the persons above named, and shall not pass to the heirs or assigns of any one of them who may de cease; that the trust hereby created should continue

the decease of the said Ellen Hammond, and, should she de-
cease before the expiration of fourteen years from the date
thereof—that is to say, on or before the twelfth day of Septem-
ber, A. D. 1909—then the said trust should continue until the
expiration of the fourteen years from the date of said instru-
ment, and in that event terminate at the end of fourteen years
from the date thereof.

“That the said declaration of trust has never been recorded,
so that the records of the title to the said lands and premises
do not disclose the correct nature and extent of the title which
the said Charles F. Hammond has in the lands and premises
aforesaid; and your orators are informed and believe, and there-
fore charge the fact to be, that the said declaration of trust
is now in the actual possession of the said Charles F. Hammond,
trustee.

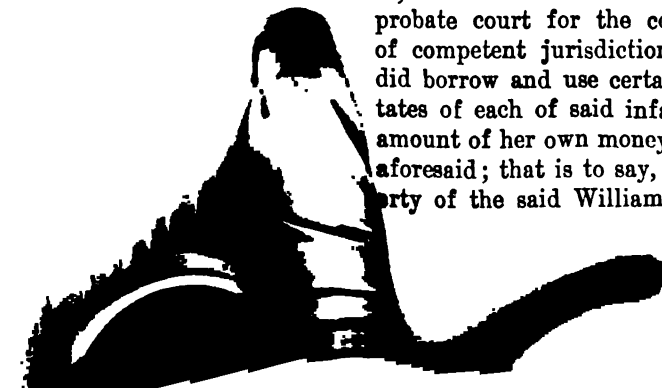
“Your orators further show unto the court that the said de-
claration of trust and the said warranty deed in truth and in fact
constitute one instrument, and together show the intent and pur-
pose with which the said Ellen Hammond, deceased, conveyed
the title of the lands and premises hereinbefore described to
the said Charles F. Hammond, trustee, and she is entitled to
have this court so declare; that by the terms thereof the said
Ellen Hammond attempted to convey the said lands and prem-
ises to the said Charles F. Hammond, trustee, for uses and pur-
poses and upon terms and conditions in violation of law, and
especially in violation of the provisions of the statute of this
state more specifically described as compiler’s sections 8796 and
8797 of the Compiled Laws of Michigan for 1897, being sec-
tions 14 and 15 of chapter 237 of said Compiled Laws, pertain-
ing to real property and of the nature and qualities of the es-
tates in real property and the alienation thereof.

“That, immediately upon the death of the said Ellen Ham-
mond, your orators, equally with the other heirs of the ⁴²³ said
Ellen Hammond, each inherited and became by right the owners
in fee of an undivided interest in the said lands and premises
by inheritance—that is to say, each an undivided one-eighth
thereof; and each of the said heirs of the said Ellen Hammond
also became the owners in fee of an undivided one-eighth in-
terest thereof by inheritance, and as such became entitled to
have and receive from time to time, as the same accrued, a like
proportion of the rents and profits arising therefrom.

“Your orators further show that George H. Hammond died
intestate in the city of Detroit in the year 1886, leaving a large

estate, consisting of real and personal property, was afterward administered in the probate court for the county of Wayne; that the administration thereof has never been completed; that a large part of the real estate thereof has never been sold, partitioned, or distributed; that, as one of the distributees of the said George H. Hammond, the said Ellen Hammond received, on account of her share or interest therein, certain real and personal property, which, converted into money, amounted to over one million dollars; that the other distributees of said George H. Hammond were George H. Hammond; Annie H. Casgrain, your oratrix; Sarah Hammond, now deceased, and of whom your orator, George H. Hammond, is the sole heir, as hereinbefore referred to; Charles F. Hammond; William J. Hammond; Florence P. Hammond; Ethel K. Hammond, since deceased; and Edward P. Hammond.

"That, after the death of said George H. Hammond, the said Ellen Hammond was duly appointed the guardian of the persons and estates of William J. Hammond, Charles F. Hammond, Florence P. Hammond, Ethel K. Hammond, and Edward P. Hammond, who were at the time minors under the age of twenty-one years, and as such guardian the said Ellen Hammond received into her possession and had the control of a large amount of money and personal property of the said infants, which was inherited by them from the said George H. Hammond, deceased, and was distributed to them out of his estate; that, as your orators are informed, the said Ellen Hammond purchased the lands and premises hereinbefore described, and erected the buildings thereon; that the said Charles F. Hammond, William J. Hammond, Florence P. Hammond, Ethel K. Hammond, and Edward P. Hammond were still minors, infants ⁴²⁴ under the age of twenty-one years, and the said Ellen Hammond was still guardian of the persons and estates, and had the control and custody of the said property; that the said Charles F. Hammond claims that the said Ellen Hammond, without any authority of the probate court for the county of Wayne, or any other court of competent jurisdiction, and without the authority of the said probate court, did borrow and use certain of the moneys belonging to the said infants, and used the same, with the aid of a certain amount of her own money, paying for the property and expenses aforesaid; that is to say, that she used of the moneys of the said William J. Hammond the sum of



said dollars, of the said Charles F. Hammond the sum of fifty thousand dollars, of the said Florence P. Hammond the sum of one hundred and twelve thousand dollars, of the said Ethel K. Hammond the sum of one hundred and sixteen thousand dollars, and of the said Edward P. Hammond the sum of one hundred and twelve thousand dollars; that your orators have no means of knowing the exact amounts of said infants' estates borrowed by said Ellen Hammond; that in the purchase of said property and erection of said building the said Ellen Hammond used, as your orators are informed and believe, and therefore allege as true, of her own money, the sum of seven hundred and fifty thousand dollars, in addition to the sums borrowed from the estates of said infants.

"That, at the time of the death of the said Ellen Hammond, the said Florence P. Hammond, Ethel K. Hammond, and said Edward P. Hammond were infants and were under the age of twenty-one years, and the said Charles F. Hammond, who had arrived at the age of twenty-one years and upward succeeded the said Ellen Hammond as guardian of the persons and estates of the said three last-named infants; that the estates of the said Florence P. Hammond, Ethel K. Hammond, and Edward P. Hammond, infants as aforesaid, have never been closed, nor has the estate of the said Ellen Hammond, deceased, ever been closed, or her accounts as guardian of the respective infants or of their estates ever been filed, settled, and allowed, nor have the accounts of said Charles F. Hammond as guardian ever been filed, settled, and allowed.

"And your orators further allege that the said Charles F. Hammond now pretends and claims that by reason of the premises, and the use of the said several sums of money belonging to the said infants by their guardian, the said Ellen Hammond, deceased, in connection with her own moneys, in paying for the property aforesaid, the said Florence P. Hammond and the estate of said Ethel K. Hammond, now deceased, as hereinbefore stated, and the said Edward P. Hammond and the said Charles F. Hammond and William J. Hammond are each entitled to have a lien upon the premises and building aforesaid for the amounts aforesaid, respectively.

"Your orators do not deny that the several sums of money respectively hereinbefore set forth belonging to the estates of the said several infants, and used by the said Ellen Hammond for the purposes aforesaid, should be accounted for by the estate of the said Ellen Hammond, nor do they deny that the-

are entitled to have the same paid. On the cor-
orators admit that the said Charles F. Hammond,
Hammond, Florence P. Hammond, Ethel K. Ha-
Edward P. Hammond are entitled to protection to
the amounts of money belonging to their said est-
tively, out of the estate of the said Ellen Hammon-
generally, or, if this court may so direct, that each
have a special or equitable lien upon the premises
described as security for the same; and your orator
the said defendants are entitled to an accounting as
and that they are entitled to have this court find and
the amount thereof.

"That the estate of the said Ellen Hammond is
cient to repay to the said infants the sums afo-
the same shall be proved according to law.

"That your orators are informed and believe that
belonging to the estates of the said infants so used
Ellen Hammond in the acquisition of the premises
struction of the building aforesaid are those refer-
claration of trust hereinbefore referred to, a co-
is hereto attached, and which the said infants are
receipt in full for and to release and discharge
the said Ellen Hammond from, as set forth in the
tion of trust, before said Charles F. Hammond,
shall convey to them, or any of them, any interest
of the said premises.

426 "And your orators allege that, notwithstanding
claims of said Charles F. Hammond as to the
moneys of said infants by said Ellen Hammond
ment of the cost of said property, your orators are
have said trust deed declared unlawful and inva-
said Charles F. Hammond is not entitled to have
the rents and profits of said premises, as he now
doing."

The bill prays that the two instruments may be
be invalid, and for an accounting of the rents and
a general prayer for relief.

Florence P. Hammond filed an answer in the
cross-bill, and asks the court to pass upon the va-
trust settlement, and that there may be an account
amount due her from the estate of Ellen Hammon-
used in the construction of the building belonging
ther defendants demurred to the bill. From an-
ling the demurrer, those defendants have appeal

A sufficient statement of the contents of the deed from Mrs. Hammond to Charles F. Hammond, trustee, dated September 2, 1895, has already appeared. On the same day there was signed and executed by Charles F. Hammond and Ellen Hammond a paper called a "declaration of trust," the material parts of which read as follows:

"Whereas, Ellen Hammond, of Detroit, Wayne county, Michigan, as party of the first part, has this day executed and delivered to Charles F. Hammond, as trustee, by conveyance in the form of a warranty deed, the following described premises, to wit, . . . for the consideration of one dollar and other valuable considerations, expressed therein. Now, I, the said Charles F. Hammond, grantee and trustee named in the said deed, do hereby declare the nature and purposes of the trust for which conveyance was made to me to be as follows:

"1. I am to let, lease, manage and control said property as shall seem best in my judgment, so as to yield as large an income as possible, and, after paying and discharging all taxes assessed against the same, and repairs to the building situate thereon, and expenses of care and management, account for and pay to the said Ellen Hammond, ⁴²⁷ for and during the term of her natural life, the net income derived therefrom at such times as she may desire for her use and maintenance.

"2. Should the said Ellen Hammond decease before the expiration of the trust created hereby, then the net income aforesaid is to be divided and paid in equal proportions by second party to Charles F. Hammond, William J. Hammond, Florence P. Hammond, Ethel K. Hammond and Edward P. Hammond, or the survivor of them, until such expiration.

"3. At the expiration of the trust created hereby, I (Charles F. Hammond) am to convey by proper conveyance to the said Charles F. Hammond, William J. Hammond, Florence P. Hammond, Ethel K. Hammond and Edward P. Hammond, or the survivor or survivors of them, the premises above described, in equal undivided shares. The interest of any one or more of the persons named, to wit, Charles F. Hammond, William J. Hammond, Florence P. Hammond, Ethel K. Hammond, and Edward P. Hammond, who may decease before the expiration of the trust created hereby, shall pass to and be conveyed to the survivor or survivors of the persons above named, and shall not pass to the heirs or assigns of any one of them who may decease.

"4. The trust created hereby by said conveyance shall continue until the decease of the said Ellen Hammond, and, should

the decease before the expiration of fourteen years from the date hereof, then the said trust shall continue until the expiration of the fourteen years from this date, and it shall terminate at the end of fourteen years from the date of the decease. Should the said Ellen Hammond survive the period of fourteen years from this date, the trust created hereby shall terminate at her decease.

"The conveyance so made is to satisfy and discharge all claims that either said Charles F. Hammond, Florence P. Hammond, Ethel K. Hammond, or Edward P. Hammond may have against said Ellen Hammond for moneys received by her as guardian, to the extent that she has invested such funds in the property above described, and, before they or she shall receive the conveyance of the interest provided for, they shall be conveyed to them at the expiration of the trust created, they shall each execute and deliver to said Ellen Hammond's legal representative proper releases and discharges of any and all such claims against her and her estate."

⁴²⁸ On the part of Charles F. Hammond it is insisted that he take either of three positions: "1. He may insist that the trust conveys the property to him absolutely, for a sufficient period of time, and neither the complainants nor any other person claiming under Hammond would have any claim upon it; or,

"2. That if the trust agreement, so called, is not an original conveyance, and the two instruments are treated as one, and the trust limitations should fail, in that event the legal title vests at once in the cestuis que trustent, and no limitation; or,

"3. That the conveyance and trust agreement, taken together, make but one instrument, and the trust created is binding upon all the world."

On the part of the complainants it is insisted that the trust to be established must fail, as in conflict with the provisions of the statute:

"Every future estate shall be void in its creation which suspends the absolute power of alienation for a longer period than is prescribed in this chapter. Such power shall not be suspended when there are no persons in being who have an absolute fee in possession can be conveyed": 3 Code of Iowa, § 6 (14).

The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer

during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section": 3 Comp. Laws, sec. 8797 (15).

It is also claimed the following sections bear upon the controversy:

"Every express trust, valid as such in its creation, except as herein otherwise provided shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust; and the person for whose benefit the trust was created shall take no estate or interest in the lands, but may enforce the performance of the trust in equity": 3 Comp. Laws, sec. 8844.

3 Compiled Laws, section 8795, is as follows: "Future estates are either vested or contingent. They are vested when there is a person in being who would ^{also} have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate; they are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain."

New York has had a statute similar to sections 8796, 8797 of 3 Compiled Laws, which has been construed a good many times. The effect of these decisions is that a suspension of the power of alienation not based on lives is void, and that the power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed: See *Moore v. Moore*, 47 Barb. 260; *Garvey v. McDevitt*, 72 N. Y. 556; *Rice v. Barrett*, 102 N. Y. 161, 6 N. E. 898; *Cruikshank v. Home for Friendless*, 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938; *People v. Simonson*, 126 N. Y. 299, 27 N. E. 380; *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238; *Trowbridge v. Metcalf*, 5 App. Div. 318, 39 N. Y. Supp. 243.

Our own statute has been construed by this court in *Trufant v. Nunneley*, 106 Mich. 554, 64 N. W. 469, in which it was held that, if effect was given to certain provisions in the will, there would be a time during which there would be no person or persons in whom the estate could vest in fee simple absolute, hence no person in being who could convey, and that this will in that regard was void, and, as to the property affected by the void will, it must be distributed under the statute.

In *State v. Holmes*, 115 Mich. 456, 73 N. W. 548, Justice Grant, speaking for the court said: "The law of this state in regard to estates in possession and in expectancy is found in 2 Howell's Statutes, section 5523 et seq. The provisions control-

rest to convey. The state ⁴³¹ has nothing to convey, as no interest until the conditions are accepted. The state has nothing to convey, and cannot have until the state neglects to accept the condition. The title to the land 'swinging in abeyance,' without protection, owner, or place. A squatter might take possession, and no one protect him. It is not exempt from taxation, because the state does not own it. It cannot be assessed to the grandson at the death of the widow, because he does not own it. This kind of things may exist for five years. It therefore violates the statute, and is void."

Such as the defendants have demurred to the bill of complaint, which avers the recorded deed and the declaration constitute but one transaction, for the purposes of this case it must be so considered. The important question, whether the effect of the two papers is to suspend the power of alienation for a period of time not based on lives. insisted by the defendants that there were always persons living in whom the title vested, and who could have joined in and conveyed the fee, and that the answer to the complaint should be no. Counsel cite *Caspari v. Cutcheon*, 110 Mich. 67, 67 N. W. 1093, *Toms v. Williams*, 41 Mich. 552, *Torpy v. Betts*, 123 Mich. 243, 81 N. W. 1094. In the *Torpy* case it was conceded by counsel that they did not render the trust void because of the statute against perpetuities, that question was not in the case. In the *Toms* case it was held that the application of rules against perpetuities depends on whether the interest devised is vested or not. What was held in that case is not controlling in this one. A reference to *Torpy v. Betts* will also show it is not controlling in this case.

Does the trustee and the cestuis que trustent join in a deed, thereby give a good title? Now that Mrs. Hammond is the trustee is not authorized by the declaration of trust to convey to anybody until fourteen years from the date of the creation of trust, and it is his duty to retain control of the property during all of that time. At the expiration of the fourteen years it is made his duty to ⁴³² make a conveyance, to all the cestuis que trustent named in the declaration of trust and their heirs and assigns, but it is expressly provided that, should any of them die during the fourteen years, the share shall pass to the heirs and assigns of the deceased one. The conveyance to be made by the trustee is to be made to all the cestuis que trustent as are living at the end of the

fourteen years. Suppose one of them should take of his interest in the premises, and should die during the fourteen years, what title would he get? Clearly nothing, for no title would ever be granted. What is true of one is true of each. Whether any of them will ever have any title will depend upon whether they live until the end of the fourteen years. It would seem to be very clear, on the terms of the trust, no one is authorized to convey until the fourteen years have expired. This, it is clearly within the provisions of the statute.

The trust, then, having failed, it would be the purpose of Mrs. Hammond to allow the warrant to issue. It is clear she had no intention of conveying to this large amount of property to Charles F. for his sole benefit. It is equally clear she did not intend the title to be presently in the persons named in the deed. We think it follows that both the estate attempted to be conveyed thereby must belong to the estate of Ellen Hammond, and under the statute: *Infant v. Nunneley*, 106 N. W. 438; *Wheelock v. American Tract Soc.*, 63 Am. St. Rep. 378, 66 N. W. 935; *St. Arm. Mich.* 344; *Coster v. Leillard*, 14 Wend. 265; 32 App. Div. 386, 63 N. Y. Supp. 81.

In *Toggenwall v. Spidenham*, 3 Dow. 194, it is held that a devise of land, which would be a heir at law, is devised for purposes which the law will not take effect, the heir at law shall have the interest so devised as undisposed of, ⁴³² and the testator intended that he should have it or not; distinction between the case of a devisee and a heir at law: That the devisee takes by force of the will of the testator, and can only take what is given him by the will, whereas the heir at law takes whatever is undisposed of by force of the intent, but by the rule of law": *Lincoln*, 95 Me. 541, 50 Atl. 898; *Gray on Intest.* 413; *Bigelow's Equity*, 17; *Jenkins v. University of Michigan*, 49 Pac. 247, 50 Pac. 785; *Greene v. Dennis*, 61 Am. Dec. 58; *Van Kleeck v. Reformed Dutch Church*, 600; *Post v. Hover*, 33 N. Y. 593; *La Farge v. Post*, 52 N. Y. Supp. 93; *Lawrence v. Smith*, 45 N. E. 259; *Thomas v. Gregg*, 76 Md. 169, 2

Green, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. L. R. A. 33.

remaining question calling for consideration is, Will the court take jurisdiction of this case? In *Davenport v. Davenport*, 95 Wis. 456, 70 N. W. 661, it is said: "Some questions have been raised whether the plaintiff has shown such possession as should entitle her to maintain this action. It is immaterial whether she was in actual possession or not. The question is whether some person was in the actual possession. One who has the right to land, whether in possession or not, may maintain an action in equity to remove a cloud of title upon his land, and the invalidity of the hostile claim cannot be shown by parol evidence, but must be proved by evidence aliunde: *Pier v. Pier*, 100 Wis. 470; *Goodell v. Blumer*, 41 Wis. 408; *Erren v. Strong*, 62 Wis. 223, 22 N. W. 408. In this case the invalidity of the defendant's claim could be shown by evidence dehors the record. Section 3186 of the *Revised Statutes* [1878] extends, rather than limits, the jurisdiction of the courts in the cases to which it is applicable: *Fox v. Fox*, 92 Wis. 320, 66 N. W. 357." See *Chautauque Bank v. White*, 6 Barb. 605; *Beedle v. Mead*, 81 Mo. 403; *Comp. Laws*, sec. 448; *Rowland v. Doty*, Harv. Ch. L. J. 3; *Ormsby v. Barr*, 22 Mich. 80; *King v. Carpenter*, 10 Mich. 363; *Eaton v. Trowbridge*, 38 Mich. 454; *Allen v. Allen*, 47 Mich. 516, 11 N. W. 366; *Cleland v. Casgrain*, 10 Mich. 139, 52 N. W. 460.

The decree of the court below is affirmed. Defendants will pay the costs of this appeal within thirty days in which to answer.

Other justices concurred.

Rule Against Perpetuities is discussed at length in the monographic note to *In re Walkerly*, 49 Am. St. Rep. 117-138. Generally speaking, the vesting of an estate is unlawfully postponed if the power to alienate may not be exercised during lives in being and within twenty-one years and nine months thereafter: *Johnston's Estate*, 185 Ill. 179, 64 Am. St. Rep. 621; *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356; *Missionary Society etc. v. Humphreys*, 91 Md. 1, 40 Am. St. Rep. 432. The severability of perpetuities and forfeitures is discussed in the monographic note to *Johnston's Estate*, 64 Am. St. Rep. 634-646.

Statute, After Its Construction by the courts of the state where enacted, is adopted as a statute by another state, such construction will usually, but not always, be followed in the courts of the first state: *Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 10 Am. St. Rep. 563, and cases cited in the cross-reference note.

GOULD v. W. J. GOULD & COMPANY

[134 Mich. 515, 96 N. W. 576.]

CORPORATION, Authority of Officers of.—The Secretary of a corporation are not presumed to have executed commercial paper. (p. 624.)

Action by Louise M. Gould against W. J. Gould & Co., a corporation, upon a promissory note. The trial court directed a verdict for the plaintiff, and the defendant appealed.

Graves, Hatch & Millis, for the appellant.

Dickinson, Stevenson, Cullen, Warren & Buttzke, for the appellee.

515 MONTGOMERY, J. The defendant is a corporation, but the record does not disclose the purposes of its organization. The present action is based upon a promissory note for \$516 four thousand dollars, purporting to be signed by W. J. Gould & Co., C. H. Gould, L. F. Thompson. The plaintiff filed an affidavit denying the execution of the note, and contending that the defendant had any benefit from or connection with the same. On the trial the plaintiff proved that a note for "W. J. Gould & Co." was made by C. H. Gould and L. F. Thompson, who were president and secretary of the corporation at the date of the note. There was no evidence showing that any consideration passed to defendant, and that the president and secretary were held out as having authority to make notes, nor that they were, by any action of the corporation, authorized in this instance to make the note in question. It was objected that the authority of these officers to execute such a note was not shown, and that, as a consequence the note was not shown to be the note of the corporation was not proved. The objection, however, received in evidence against defendant's contention, and this ruling presents the principal question in the case.

The general rule is that the president of a corporation has no implied power to bind the corporation by his execution of commercial paper, and that this power is not conferred upon the president and secretary: 21 Am. & Eng. Enc. L., 2d ed., 859. See, also, 3 Clark and Marshall on Corporations, sec. 701; 2 Cook on Corporations, 4th ed., sec. 701.

at the authority to transact business of this character implied where it is shown either that the president has held out as having charge of the business, and as author- perform such an act on behalf of the corporation as question, or where the corporation is shown to have and retained the benefits of the transaction: See 4 Thompson on Corporations, sec. 4623. So, where the instrument is executed under the seal of the corporation, a presumption arises that it was executed by authority: 4 Thompson on Corporations, sec. 4623. It is also true that, where there is evidence that the president of a corporation is engaged in managing the business, such powers will be ascribed to him as are necessary in the conduct of the business of the ⁵¹⁷ corporation: See *Ceeder v. Loud etc. Lumber Co.*, 86 Mich. 541, 24 N. W. Rep. 134, 49 N. W. 575; *Hirschmann v. Iron Range etc. Co.*, 97 Mich. 384, 56 N. W. 842. But the ruling of the judge in the present case apparently rests upon the idea that the president and secretary are presumed to have authority to execute commercial paper, and that proof that commercial paper was signed by them shifts the burden of proof upon the defendant. We think this holding cannot be sustained upon authority. The only Michigan case tending to support this ruling is *Eureka Iron etc. Works v. Bresnahan*, 60 Mich. 332, 27 N. W. 524. But in that case it appeared that, not only was the mortgage in question signed by the secretary and treasurer of the corporation, but that the mortgage was agreed upon and approved by all the directors and stockholders of the company assembled together, and the mortgage was drafted and executed in their presence. The case, therefore, did not rest upon any question of authority.

We are cited to the case of *Patterson v. Robinson*, 116 N. Y. 22, 2 N. E. 372, in which language is used apparently sustaining the ruling of the circuit judge in the present case. But, upon a close examination we have been able to give the subject, it would appear to stand alone, and, for an understanding of the New York rule, should be compared with *Columbia v. Gospel Tabernacle Church*, 127 N. Y. 361, 28 N. E. 29. What we have said above we by no means imply that the courts will not take judicial notice of the usual powers of certain officers of particular corporations, such as bank cashiers. The ruling below cannot be sustained on any such presumption. The execution of the note in question was not sufficiently

proved. The other questions presented are not on a new trial.

Judgment is reversed and a new trial ordered.

The other justices concurred.

The President of a Corporation does not, by virtue of his office, possess authority to bind the company by contract. Butledge, 115 Wis. 583, 95 Am. St. Rep. 964, and see in the cross-reference note thereto. As to his right to bind the company, see *Sampson v. Fox*, 109 Ala. 662, 5 So. 950. If the statutes expressly confer the management upon "not less than three directors," the president is not a general agent: *City Electric etc. Ry. Co. v. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282.

PEOPLE v. DETROIT UNITED RAILWAY

[134 Mich. 682, 97 N. W. 36.]

STREET RAILWAYS—Municipal Control Over.—A municipality has the right to regulate the conduct of a street railway business to the extent of requiring reasonable safeguards against danger. (p. 630.)

STREET RAILWAYS—Presumption in Favor of Regulation.—A municipal ordinance which shows on its face that it is intended to end in contemplation of the securing of reasonable safeguards against danger will ordinarily be presumed to be valid. (p. 630.)

STREET RAILWAYS—The Discretion of a Municipality in Imposing Safeguards Against Danger on Street Railways.—The discretion of a municipality in imposing safeguards against danger on street railways cannot be interfered with on light grounds, nor where the ordinance is shown to be a fair condition. (p. 630.)

STREET RAILWAYS—Ordinance Requiring the Use of Air or Electric Brakes.—A court will not say that an ordinance requiring the use of air or electric brakes on street railways is invalid unless it clearly appears that there is no necessity for the use of such a brake than that in use, or that neither the air nor the electric brake is such. (p. 630.)

EVIDENCE—Judicial Notice.—The Court may take Judicial Notice that Atmospheric or Vacuum Brakes are in common use on passenger trains and common on freight cars, and are safe. (p. 630.)

EVIDENCE—Judicial Notice—Conflict of Witnesses.—The validity of a municipal ordinance requiring the use of air or electric brakes cannot be made to depend on the testimony of a court or jury may conclude from the testimony of witnesses as happen to be brought into court on the question of the validity of such ordinance, when the facts of which the court may take judicial notice are clearly within the discretion of the city council. (pp. 630, 631.)

STREET RAILWAYS—Regulations Requiring the Use of Air or Electric Brakes.—A municipal ordinance requiring the use of

on street railways will not be held invalid on the ground will require a large outlay or that it takes property without process of law. All property is subject to the exercise of the power. (p. 631.)

STREET RAILWAYS—Municipal Authority Under Reservation of the Right to Make Further Orders, Rules and Regulations.

An ordinance consenting to the construction of a street railway, the common council of the municipality reserves the right to make further rules, regulations, and orders as may from time to time be deemed necessary to protect the interest, safety, welfare, and accommodation of the public, it may require such railway to use air brakes on all its cars. (p. 631.)

Forster, Donnelly & Van De Mark, Charles D. Joslyn, Henry C. Forster and John J. Speed, for the appellant.

Forster, Donnelly & Van De Mark, Charles D. Joslyn, Henry C. Forster and John J. Speed, for the appellant.

HOOVER, C. J. The defendant is a street railway company and was convicted and fined in the recorder's court of the city of Detroit for the violation of an ordinance of said city. The cause is here upon certiorari.

There is no doubt of the violation of the ordinance. The defendant being tried without a jury, the court determined the reasonableness of said ordinance, which appears to be turned upon questions of fact. Counsel for the defendant in their brief that "there can be but one question for the court to decide; i. e., Is it a reasonable regulation to require the defendant company to equip its cars with air or electric brakes?" The railroad was constructed under the statutes existing at different times, ⁶⁸⁴ when different sections were in force, the present status of the company being the outcome of successive purchases or consolidations, or both. All of said statutes required the consent of the city authorities, and this was the case in the various instances. The following reservation of power is contained in such consent, and is applicable to the present case: "It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways."

In the same connection should be read sections 6425 and 6447 of the Compiled Laws, viz.: "All companies or corporations operating for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by the city. Provided, that no such company or corporation shall be authorized to construct a railway under this act through the

experimental stage; that they have been repeatedly tried and discarded in cities, and that, if used, they increase the probability of accident, both by reason of the uncertainty of their operation when an attempt is made to use them, and the uncertainty of the minds of motormen which brake had better be used in case of emergency. There was testimony offered in opposi-

tion to the object of this ordinance is to compel the equipment of street cars with the means of stopping with certainty and expedition. We may take judicial notice that this is desirable, and that the courts are judicially cognizant of the fact that the use of street-car brakes is necessarily attended by imminent danger to citizens who are upon the highway, as well as ^{and} passengers. It is concluded that this ordinance is invalid, first, because it can be said that it does not provide for brakes which will tend to lessen danger; second, because its enforcement will require an outlay large in comparison with the benefits which would result from the use of such brakes as are required by it. A large amount of testimony was taken upon both these questions, and this was passed upon by the trial judge, who has held the ordinance valid.

It is a past controversy that the city may regulate the conduct of a defendant's business to the extent of requiring reasonable precautions against danger: *Nellis on Street Surface Railroads*, 208, 219; *City of Kalamazoo v. Michigan Traction Co.*, 12 Mich. 525, 85 N. W. 1067; *City of Detroit v. Detroit etc. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46 L. ed. 592; *Shore etc. Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. Rep. 465, 43 L. ed. 702; *Chicago etc. Ry. Co. v. City of Carlin-* 200 Ill. 314, 93 Am. St. Rep. 190, 65 N. E. 730, 60 L. R. 11; and other cases cited in briefs of counsel. Many regulations are permissible, although in all or most instances they involve some limitation on the liberty or burden upon the property of individuals. Sanitary regulations are common, including the abolition of slaughter-houses and other noxious places, and restrictions upon burial. Protection against fire and danger from explosions, the use of highways and speed of vehicles, regulation of occupations, buildings, etc., are among the many instances where municipal action is upheld. An ordinance which, on its face, shows that such end was in contemplation, will ordinarily be presumed to be valid: See 21 Am. & Ency. of Law, 2d ed., p. 978, and cases cited; Booth on Street Railway Law, sec. 224; Cooley's Constitutional Limitations, 6th ed., p. 241, note; *Nellis on Street Surface Railroads*,

may take judicial notice, are reasonable, and clearly with-
discretion of the council, either by virtue of a reserved
resting in contract, or the police power.

do not feel called upon to say much about the claim
is ordinance should be held invalid upon the ground
will require a large outlay, or that it takes property
due process of law. It is too well settled that the state
may enforce regulations clearly looking to the safety of
lic, and reasonably adapted to such end, to make it nec-

All property is held subject to the exercise of the police
See *Village of Carthage v. Frederick*, 122 N. Y. 268, 19
t. Rep. 490, 25 N. E. 480, 10 L. R. A. 178; *Attorney*
l v. Jochim, 99 Mich. 371, 41 Am. St. Rep. 606, 58
611, 23 L. R. A. 699. In *Cooley's Constitutional Lim-*
s, 6th ed., p. 708, it is said: "All contracts and all rights,
eclared, are subject to this [police] power; and not only
regulations which affect them be established by the state,
such regulations must be subject to change from time
e, as the general well-being of the community may require,
the circumstances may change, or as experience may dem-
te the necessity": See cases cited in note to last authority.

as been urged that the proof shows that a light car
as effectively handled and controlled by hand as by power
, and there is proof to that effect, and also that electric or
akes are less reliable than hand-brakes on such cars. This
is covered by what has been said. If the air-brake or elec-
ake is more liable to get out of repair, and there is diffi-
in stopping the car at a given point, it is not shown that
supervision would not assure effective brakes at all times,
that the employment of skilled or experienced motormen
not overcome the latter difficulty. But, if not, the
vidence, as well as common experience, shows that a power
is quicker in its action; and in emergencies, where human
s involved in delay, expeditious stopping of a car should
ield to possible inconvenience in the matter of stopping
s.

is also said that the ordinance is invalid even if air-brakes
e said to be effective, because it does not designate between
nd electric brakes, which last are said to be clearly shown
ineffective. We think there is no force in this point. It
t to be presumed that anyone will use the latter under
circumstances. Defendant certainly is not required to.
e conviction is affirmed.

Moore, Carpenter, and Grant, JJ., concurred
C. J.

MONTGOMERY, J., concurring. It is the defendant that the ordinance in question is unreasonable, that for this reason it should not be enforced. A limitation upon the power of a municipal legislature which the courts have the right to enforce, and an ordinance which is unreasonable in its terms is beyond the power of such legislative body to enact, is well settled. There is no doubt, either, that where, upon the face of the ordinance, it is shown to be unreasonable, the question which the courts determine becomes purely a question of law. But in this case. In the present case the contention is that the ordinance is unreasonable, as shown by the testimony and circumstances; in other words, that although the courts would not be able to say on the face of the ordinance that it is unreasonable, yet because of the existence of certain facts it is claimed the testimony establishes in the case that it should hold that the ordinance is unreasonable. These facts are not facts of which the court can take judicial notice. The facts claimed to be proven in the case; and the question is, Who is to determine these facts? It may be conceded that the authorities ⁶⁸⁰ are not agreed upon the question, and it comes necessary to look somewhat to the reason of the rule.

The rule is stated in 1 Dillon on Municipal Corporations, fourth edition, section 327, as follows: "Whether an ordinance be reasonable and consistent with the law or not is a question for the court, and not the jury, and evidence to the contrary on this subject is inadmissible. But in determining the reasonableness of the ordinance the court will have regard to all the circumstances, the particular city or corporation, the object sought to be accomplished, and the necessity which exists for the ordinance."

This statement of the law is strictly accurate in all cases in which the question depends upon facts which the court may take judicial cognizance. But there are cases which go further, and hold that, where the question of the validity of the ordinance depends upon facts, while it may be competent for the court to take testimony as to these facts, and to take the testimony into consideration in determining the validity of the ordinance, the question is in no case a question for the jury; in other words, it is to be determined as a question of law, and not of fact. One of the strongest cases supporting

Illinois Cent. R. R. Co. v. Whittemore, 43 Ill. 420, 92 Ill. 138. In that case it was said: "It was proper to admit testimony, as was done; but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and therefore obligatory upon the passengers. The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railway would be held liable and in another, presenting the same question, not liable. The companies nor passengers would know their rights or obligations."

The reason assigned in this opinion appears to be the one upon which the rule rests so far as it has been adopted, viz., that when, in a particular case, an ordinance is ⁶⁹¹ declared to be unreasonable, that determination will control future cases that may arise under the ordinance, whether the question arises between the same parties or not. If the application of the rule fails, the rule should fail. It is certainly absurd to hold that A may be concluded in a proceeding between B and C, to which A is not a party, when that judgment rests upon a determination by some one of a question that the whole realm of adjudicated cases may be searched for another instance of this character. The very reason upon which the rule rests refutes the rule. So far from being true that, in a proceeding depending upon a question of fact, future litigants should be finally concluded, the exact opposite is true, and an ordinance which may be declared, upon a certain state of facts proven to the court or jury, to be invalid in a proceeding depending between A and B in which C may be involved a trifling amount, cannot be held to conclude C, who may have vested rights to the amount of thousands or millions of dollars. To illustrate: Suppose in an action between third parties it had been determined that the original franchise granted to this defendant was invalid as wholly unreasonable; can the vested rights of this corporation be said to have been divested in a proceeding to which it was not a party? Such a proposition shocks the sense of justice, and fortunately we are not without authorities which have a direct bearing upon this question.

In the case of *Pennsylvania R. R. Co. v. Mayor of City*, 47 N. J. L. 286, a proceeding was commenced on the part of the city declared to be unreasonable, and it was said: "This proceeding in effect is an abolition of this ordinance in toto, and, as a whole, is not open to the imputation of unreasonableness. It is to put upon a proper footing the use of railroad tracks within the municipal bounds, and there is no pretense that it is unduly upon any of such companies, except that it is the plaintiff in error in passing its numerous tracks across three certain streets near its terminal depot. If this allegation to be true, that the business of the city is in error at this particular locality is by that ordinance is manifestly embarrassed and burdened, such a vice in the ordinance will not render it generally, but only specially, inefficient. If so, is, the court would not vacate the entire ordinance, but would refuse to put it in effect in that part of it that was unreasonable."

And a somewhat analogous question has arisen in the federal courts. As is well understood, the federal courts have held, under the fourteenth amendment, a statute of a state imposing freight or passenger charges may, if it be unreasonable in its terms, be held unconstitutional and void in its application to a particular case. But the federal supreme court has, as we shall see, that the determination of this question in a particular case does not conclude the question for all cases between parties standing in a different relation to the state authorities. This is well illustrated in the case of *Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 419. That was a case in chancery, and the question of the unreasonableness of the statute as applied to the complainant was determined upon a full review of all the facts of the case. It was held that the statute, as applied to then conditions, was reasonable. But it is significant that in the very course of the opinion the court fully approve of the provision in the decree of the chancery court that the defendants, members of the board of directors, might, "when the circumstances have changed so as to make the fixed in the said act of 1893 [Neb. Acts 1893, c. 24] unreasonable, yield to the said companies reasonable compensation for the services aforesaid," apply to the court by bill or petition, and they might be advised, for a further order in that behalf. In fact, it is possible that, as between the same parties, the court might have stated the reasonableness of a statute (or order)

question may again be opened as a question of fact, how much more may it be said that, as between strangers to that litigation, the judgment depending upon a question of fact has not concluded them.

⁶⁰³ In the case of Brooklyn Crosstown R. Co. v. City of Brooklyn, 37 Hun, 416, it was said: "The validity of every ordinance or by-law of a corporation which is not passed in strict compliance with statutory delegation of power depends upon its reasonableness, . . . and hence that point [the reasonableness of the ordinance] was a proper subject for judicial examination as a question of fact."

If, then, there is involved in the case a question of fact, how shall that question be determined? As I have endeavored to show, the reason assigned by some of the authorities why it should not be a question for the jury is a wholly insufficient one. Worse than that, it is a false reason, which leads to erroneous and unjust results. We are not wanting, however, in authority which sustains the rule which I have foreshadowed. In *Clason v. City of Milwaukee*, 30 Wis. 316, it was said: "It is impossible for the court to determine whether or not the ordinance is reasonable and proper, in view of the object sought to be accomplished, without some evidence upon the subject. And we cannot see that it is a violation of any principle to submit these questions of fact to a jury as in other cases."

This case was followed by the case of *City of Austin v. Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528, in which it was held that it is incumbent upon a party who alleges the invalidity of an ordinance as unreasonable to aver and prove the facts which make it so; that, if the facts be controverted, they must be determined by the jury; but that whether the facts relied upon show the ordinance to be unreasonable or not is a question for the court.

So, in *State v. Boardman*, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750, it was said: "It is true that the question of the reasonableness of a by-law is for the determination of the court, and this conclusion does not take away from the court the determination of the question. Certain facts will have to be passed ⁶⁰⁴ upon by the jury. But the standard upon the question of the reasonableness or otherwise of the by-law is established by the court."

In *Chicago etc. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. Rep. 400, 36 L. ed. 176, the question of the reasonableness of a statute fixing the maximum rate at two cents per mile was in-

waived. It was said: "If the validity of such a law order to a particular company depends upon a question as to its effect upon the earnings, may not the court leave that question to the jury, and decline to assume effect is as claimed? There can be but one answer."

The invalidity of the ordinance in the present case upon the ability of the defendant to establish it. This is undertaken to do. The case was tried with the trial judge, however, stood in the position of finding as a fact that the ordinance was not unreasonable then within the province of the defendant's counsel a more specific finding of facts. Thus they failed to let better practice would have been to have had a finding upon the particular facts which are claimed invalidity of the ordinance. But the record is not. In my view, unless we are able to say that the ordinance is in one direction, and that is to show the unreasonableness of the ordinance, the plaintiff in certiorari has not the position to review the decision of the trial judge. And the testimony all one way, I think the judgment affirmed.

POWER OF MUNICIPAL CORPORATIONS TO MAKE FORCE REGULATIONS RESPECTING STREET FOR THE PROTECTION OF THE PUBLIC.

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In this note we shall confine ourselves to a discussion of the power of a municipality to regulate street railways only in so far as such regulations tend to protect the life or limb of the public. Hence we shall exclude from our consideration such regulations as fix the rate of fare or the frequency with which the company shall run its cars, or regulations affecting merely the convenience of the public, such regulations as are imposed by the terms of the charter or franchise granted to the company. In our discussion of the subject, we shall in doubt whether the purpose of a regulation is for the protection of the public, we shall resolve the doubt in favor of such protection and include it within the scope of this note. We shall limit our discussion to the general principles of law governing the subject only in an incidental manner.

II. General Effect of Acceptance of Franchise.

The acceptance of a franchise to operate a street railway amounts to a contract between the governmental body granting the franchise and the street railway company. Hence where the franchise contains terms or conditions, or reserves the power to impose new terms or conditions, the street railway company is bound thereby: *Bauman v. Mankato*, 60 Minn. 244, 62 N. W. 127; *Chouquette v. South Electric R. R. Co.*, 152 Mo. 257, 53 S. W. 897; *City Ry. Co. v. Citizens' R. R. Co.*, 166 U. S. 568, 17 Sup. Ct. Rep. 653, 41 L. ed. 1114; *Boit v. Fort Wayne etc. Ry. Co.*, 95 Mich. 456, 35 Am. St. Rep. 54 N. W. 958, 20 L. R. A. 79. But of course the municipality cannot go outside of the franchise and impose new terms and conditions which would practically destroy the grant or its value. A municipality, however, when it grants the right to use the streets for the operation of a street railway does not surrender its right to con-

trol the streets: *Pawcatuck Val. St. Ry. v. Westerly*, 47 Atl. 691. Where a street railway company, in accordance with a franchise, agrees to certain conditions imposed by the municipality, it is estopped thereafter from claiming that the conditions are unreasonable: *In re Topping Ave.* (Mo. Sup.), 86 S. W. 190. *T. & E. Ry. v. Fort Wayne etc. Co.*, 95 Mich. 456, 35 Am. St. Rep. 958, 20 L. R. A. 79, a reservation in the ordinance granting the franchise "to make such further rules, orders or regulations as from time to time be deemed necessary to protect the interest of the fare or accommodation of the public," was held to reserve the right to enact an ordinance requiring the company to sell tickets for cars for sale at certain times tickets good for transportation at certain hours at a reduced rate of fare.

III. General Nature of the Police Power

Many attempts have been made to define the police power, but never with entire success. It is always easier to detect a particular case comes within the general scope of the power than to give an abstract definition of the power itself which would be respects accurate. No one, however, denies that it includes all matters appertaining to the public health or public morals. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079. For a discussion of what constitutes the police power, see the note to *Booth v. State*, 101 St. Rep. 236.

It may, however, be said that the police power, like all other powers, is subject to constitutional limitation. The legislature cannot exercise the pretense of exercising this power, enact laws not necessary for the preservation of the health and safety of the community, or be oppressive and burdensome upon the citizen. If a law tends to inhibit that which is harmless in itself or command that which does not tend to promote the health, safety or welfare of the community, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation unconstitutional. *etc. Ry. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 6. Railways and corporations are created solely for the public good and are subject to the proper agencies to protect the public interests. Railways are also subject to the public, but they serve them with a view to the profit of their shareholders: *Central Ry. & Electric Co.'s Ap. v. City of St. Louis*, 199, 35 Atl. 32. By the general police power of the state, the lives and property are subject to all kinds of burdens and taxes in order to secure the general comfort, health and prosperity of the people: *State v. Canal etc. R. R. Co.*, 50 La. Ann. 1189, 18 L. ed. 287. But a municipal corporation can only exercise the police power as is fairly included in the grant of powers to it: *Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 Ky. 100. The power of Municipality to Regulate Street Railways: *etc.* Railways and companies are subject to police regulation: *etc.* The private citizens: *Toledo etc. Ry. v. City of Toledo*, 101 St. Rep. 236.

67 Ill. 37, 16 Am. Rep. 611; Consolidated Traction Co. v. Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170. Hence it is said that the granting of a charter to operate a street railway does not deprive a city of the power to make reasonable regulations for the enjoyment of such charter in such way as is inconsistent with the safety of the public: South Covington etc. Ry. v. Berry, 93 Ky. 43, 40 Am. St. Rep. 161, 18 S. W. 1026, 15 L. R. A. 604; Hudson River Tel. Co. v. Watervliet etc. Co., 135 N. Y. 393, 31 Am. St. Rep. 838, 32 N. E. 148, 17 L. R. A. 674; Mayor v. Dry Dock etc. Co., 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563; Milwaukee St. Ry. v. Adlam, 85 Wis. 142, 55 N. W. 181. In other words, the common council of a city may prescribe by ordinance from time to time such reasonable regulations for the operation of street railway companies as may be necessary for the protection of both the company and the public: Toledo etc. Street Ry. v. Toledo Electric St. Ry., 50 Ohio St. 603, 36 N. E. 312. The legislative franchise to run street-cars prescribing certain conditions to be performed by the grantees is not a contract in such a sense as to exempt the occupation from lawful police regulations and municipal taxation: San Jose v. San Jose etc. Co., 53 Cal. 475. But where the power to pass ordinances on a given subject is conferred by the legislature, and the mode of its exercise is not prescribed, the ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be declared invalid: Shelbyville v. Cleveland etc. Ry. Co., 146 Ind. 70, 44 N. E. 929. In State v. Canal etc. R. R. Co., 50 La. Ann. 1189, 24 South. 265, 56 L. R. A. 287, the court, in discussing this subject, approved the rule laid down by Mr. Tiedeman that: "The subjection of existing corporations to new regulations does not involve a repeal or amendment of their charters, for an act of incorporation simply guarantees the right to act and do business as a corporate body, subject, of course, to the laws of the land and the legitimate control of the government."

A distinction seems to exist as between the power to regulate street railways and steam railroads. Thus in Consolidated Traction Co. v. Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170, it was urged that a municipal ordinance regulating the use of salt on its tracks impaired the company's franchise to such a degree as to be unlawful. The court, in answer to this objection, said: "In considering this ground of objection, the status of these companies in their use of the streets must be borne in mind. A street railroad company uses as its roadbed public streets, provided and improved at public expense, and acquired and held for the benefit and advantage of the public at large. In this respect, such a company occupies a position different from that of a railroad company exercising its franchises and transacting its business upon a roadbed provided at its own cost and for its exclusive use, except at crossings over streets and highways. The legislature, in authorizing a street railway company to make use of the public streets, intended that the grantee

of such privileges should be subject to municipal greater scope than would be allowable in the case of paving and using their own roadbed."

So, also, it is held that a city has power for the citizens and their property, to regulate the mode within the municipal limits, to say whether steam shall be employed, and to prescribe the rate of speed. *State*, 16 Miss. (8 Smedes & M.) 649. See, also, *Co. v. Buffalo*, 5 Hill, 209. In *Brooklyn v. Nassau*, 38 App. Div. 365, 56 N. Y. Supp. 610, the court appreciate the dangers occasioned to pedestrians from the use of trolley-cars, and see the propriety of regulations that the common council may impose upon the management of such cars for the safety of the public, subject to the qualification that such requirements be reasonable, that is to say, practical—not from the point of view of the company operating the cars, but practical in the sense that they may not improperly interfere with the discharge of the duties of such companies in transferring passengers."

Very often ordinances regulating street railways are held invalid on the ground that they impair vested rights or deprive the owner of its property without due process of law. Chief Justice in *Railroad Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 73, made an argument of that character, observed: "All property within the city is subject to the legitimate control of the government. The city is protected by 'contract rights,' which is not the case with the railroad. The appropriate regulation of the use of property is not 'takings' within the meaning of the constitutional prohibition."

V. What Constitutes Regulation.

It is often quite difficult to determine whether a regulation is of the character which we are discussing comes within the scope of a regulation. In order that the regulation of a corporation be within the constitutional limitation of police power, it must be shown to be necessary to the welfare of society by the prevention of actions which are calculated to inflict injury upon the individuals: *State v. Canal etc. R. R. Co.*, 50 La. Ann. 265, 56 L. R. A. 287. So, also, ordinances purporting to regulate street-calls or otherwise must preserve equality of rights. *Covington*, 90 Ky. 444, 29 Am. St. Rep. 398, 14 S. W. 556. In this connection see, also, the note to *Booth*, 100 Am. St. Rep. 236.

Appeal of Central Ry. etc. Co., 67 Conn. 199, 35 Am. St. Rep. 100, is illustrative of the powers of a municipality as to the determination and operation of street railways. In that case the city legislature authorized the company to lay its tracks and required it to present a plan of location and construction. The city was authorized to "accept and a

or make such modifications therein as to them shall seem proper." The city was also given exclusive direction over the placing, material, quality and finish of any street railway tracks, wires, fixtures or structures, including their relocation or removal, and of changes in grade for the purpose of any public improvement. The court, in defining the powers of the municipality with respect to these statutory restrictions, said: "To modify is ordinarily to change the mode in which a subject is dealt with, rather than to change the subject itself. No change can properly be deemed a modal one which deprives that which is changed of any of its essential qualities or adds anything which is wholly foreign." And continuing, the court said: "The location of a railway upon a highway is a different thing from the right to make such a location, and presupposes a prior grant of that right. The location definitely appropriates a particular portion of the highway for railroad use, establishes the grade at which the tracks are to be laid upon it, and may make extensive changes in the course, character or use of the remaining portions. As to any of these matters the city had a power of modification. It had like power as to the kind and quality of tracks, the method of laying them, the motive power to be used, and the method and manner of its application. It would be, for instance, merely a modal change to vary a plan for applying electric power by means of an overhead trolley, by requiring the substitution of an underground circuit or of a storage battery upon the car. The essential feature of the plan would be the use of electric power. The method and manner of its application, whether by rows of high poles, with a network of connecting wires, or in ways that affect the ordinary uses of the highway less directly, are left to the regulation of the local authorities."

But, on the other hand, it has been held, where a statute requires street railway companies to use fenders in passenger cars, but provides that the corporation, commissioners may "make exemptions" from the provisions of the statute, that an order exempting all street railway companies from the provisions of the statute until otherwise ordered, is a suspension of the statute, and hence invalid.

In the principal case (*People v. Detroit United Ry.*, ante, p. 626), it was held that the discretion of the city council in enacting an ordinance requiring street railway companies to equip their cars with air-brakes for the greater safety of the public will not be interfered with if the requirement can fairly be said to tend toward a better and safer condition.

VI. Necessity for Regulation to be Reasonable.

In order for ordinances of a regulatory character to be valid, they must be reasonable, fair, impartial and not arbitrary or oppressive: *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902; *Champer v. Greencastle*, 138 Ind. 339, 46 Am. St. Rep. 390, 35 N. E. 14, 24 L. E. A. 768; *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, Am. St. Rep., Vol. 104-41

30 L. R. A. 225; *McFarlane v. Chicago*, 185 Ill. 242, *Anderson v. Wellington*, 40 Kan. 173, 10 Am. St. Rep. 719, 2 L. R. A. 110; *Stafford v. Chippewa Val. Electric Wia.* 331, 85 N. W. 1036; *Yick Wo v. Hopkins*, 118 U. Ct. Rep. 1064, 30 L. ed. 220.

VII. How Reasonableness of Regulation is Determined

Where an ordinance is within the powers granted to it in its charter, the presumption is that it is reasonable. Judicial power to declare it void can be exercised on the inherent character of the ordinance or from evidence of its operation, it is demonstrated to be unreasonable. *Traction Co. v. Elizabeth*, 58 N. J. L. 619, 34 Atl. 140, 170. Likewise in *Cape May etc. R. R. Co. v. Cape May*, 404, 36 Atl. 678, 36 L. R. A. 657, it was held that ordinance by virtue of an implied power conferred upon municipalities must be reasonably consonant with the general powers of the corporation, and not inconsistent with the law of the state, but that, on the other hand, such ordinances under such implied powers, will not be interfered with if manifestly unreasonable and oppressive and invading private property. The court furthermore observed that the unreasonable ordinance which related to stopping at crossings was void on its face, and that the burden was on the proponent wherein it was arbitrary, unjust or oppressive.

In *Mayor v. Dry Dock etc. R. R. Co.*, 133 N. Y. 104, 200, 609, 30 N. E. 563, the court, in considering the reasonableness of the street railway to run not less than one car every fifteen minutes between certain hours, said: "Presumptively, it was required in the interests of the public, for whom the railroad companies hold and must operate their franchise. The presumption is open to rebuttal by this defendant's evidence facts which show that in its case its enforcement was unreasonable, and that the conveniences of passengers required such a regulation. It was therefore competent for the plaintiff upon the trial to give evidence of such facts as would tend to establish, that the convenience of passengers of the public did not require the running of its cars during the hours specified. Such facts were plainly relevant to the question of the reasonableness of the ordinance, and bore upon the question of the reasonableness of the ordinance in the defendant's case."

Likewise, in *Denver etc. Co. v. Denver*, 21 Colo. 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

ing air or electric brakes on street-cars is unreasonable, still could be insufficient to nullify the ordinance, since the court may take judicial notice that air-brakes are extensively used and are effective. And the court in that connection also observed: "The validity of an ordinance cannot be made to depend upon what a judge, a justice of the peace, or a jury may conclude from the testimony and opinions of such witnesses as may happen to be brought into court in the first case that arises, whereas, in this case, the provisions, when viewed in the light of facts of which the courts take judicial notice, are reasonable and clearly within the discretion of the council, either by virtue of a reserved power resting in the street-trust, or the police power."

A somewhat similar principle was announced in *People v. Armstrong*, 73 Mich. 288, 16 Am. St. Rep. 578, 41 N. W. 275, 2 L. R. A. 101, which, however, did not involve an ordinance affecting street cars. It was there held that a city ordinance, to be reasonable, must tend in some degree to the accomplishment of the object for which the municipality was created and its powers conferred, but that the reasonableness of such an ordinance is not determined by the gravity of some offense which it seeks to prevent and punish, but by its actual operation in all cases that may be brought thereunder. See *Getchell etc. Mfg. Co. v. Des Moines Union Ry. Co.*, 115 Iowa, 187, 87 N. W. 670, it was held that the enactment of an ordinance to be presumed to have been for the public good, and, in the absence of any contrary showing, it will be assumed that in passing an ordinance compelling a street railway company to remove its tracks from the sidewalks and alleys, that it had in view the convenience and advantage of the citizens. And in the recent case of *Rochester v. West*, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673, 53 L. R. A. 548, the court, in discussing the validity of a bill-board ordinance, said: "The validity of a statute is not to be determined by what has been done in any particular instance, but by what may be done under it: *Stuart v. Ulmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Gilinan v. Tucker*, 128 N. Y. 28, 26 Am. St. Rep. 464, 28 N. E. 1040, 13 L. R. A. 304. It is fully true that the validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is usually intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, the statute and the ordinance are lawful and must be sustained: *Page v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 10, 10 L. R. A. 178; *People v. Pratt*, 129 N. Y. 68, 29 N. E. 7; *Mayor v. Dock etc. R. Co.*, 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 104; *Rochester v. Simpson*, 134 N. Y. 414, 31 N. E. 871; *People v. Moor*, 149 N. Y. 195, 204, 52 Am. St. Rep. 707, 43 N. E. 541, 31 L. R. A. 689." See, in this connection also, the discussion under the next section devoted to the rules of construction.

**VIII. Effect of Regulation Requiring Large Outlay in
Whether It is Reasonable.**

In the principal case (*People v. Detroit United Ry.*, one of the contentions urged by the street railway company was the validity of the ordinance requiring it to equip its cars with electric brakes was that it required a large outlay in order to obtain the resulting benefits. In other words, that it took more out of the pocket of the company than it put out due process of law. The court, as we have seen, decided against the contention. In *Mayor v. Dry Dock etc. Co.*, 133 Mich. 1, 100 Am. St. Rep. 609, 30 N. E. 563, it was said that the unreasonableness of an ordinance requiring a street railway to run a certain number of cars during certain hours was not controlled by the amount of expense to the company. The invalidity of an ordinance requiring the use of salt on the tracks was urged on the ground that the expense involved, in *Consolidated Traction Co. v. Elizabeth*, 141 L. 619, 34 Atl. 146, 32 L. R. A. 170. The court said: "The company cannot so successfully operate its road under the conditions imposed by the ordinance, or that conformity to the conditions prescribed by the ordinance will occasion increased expense, will not be sufficient to justify such judgment."

So, also, in *State v. Canal etc. R. Co.*, 50 La. Ann. 112, 265, 56 L. R. A. 287, it was argued that an ordinance requiring a street railway to water its track so as to lay the dust was such an expense as to render the ordinance so burdensome as to seriously impair its franchise and render its franchise void. But the court said: "To this proposition there are two sufficient answers: 1. That this exigency of defendant's franchise may be reasonably supposed to have been within the contemplation of the contracting parties when the franchise was secured, and 2. That the greatly increased comfort of travel which the suppression of the dust would entirely compensate the increased cost by a corresponding increase of travel."

In *Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa. 381, 19 Atl. 695, an ordinance of Philadelphia passed in 1857 provided that all street railways should be at the "entire cost and expense of paving, repairing and repaving that may be necessary on any road, street, avenue or alley occupied by them." The company was the result of a merger and consolidation of two companies which had accepted a charter which subjected them to the aforesaid ordinance. Subsequently (1886) the city directed the repaving of certain streets occupied by the company with Belgian pavement instead of cobblestones.

It was argued that the company could not be compelled to use more expensive material than was in use at the time when the company had obtained its charter, but the court held that the company was bound to keep pace with the progress of the city.

it continues to exercise its corporate functions. The question may also arise in *Brooklyn v. Nassau Electric R. R. Co.*, 38 App. 35, 56 N. Y. Supp. 609, but the court rejected the argument, that the reasonableness is not determined from the point of view of expense, but from the practicability of the regulation in case of not interfering with the transfer of passengers.

Effect of Express Legislative Authority on Reasonableness.

Is the power to legislate on a given subject is conferred on a municipal corporation by the legislature, but the details or manner of exercising it are not specified, an ordinance passed in pursuance of it must be a reasonable exercise thereof, or it will be declared void. *Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 13 N. E. 480, 10 L. R. A. 178; *Haynes v. Cape May*, 50 N. J. L. 1, 13 Atl. 231; *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278; *Dunham v. Board of Rochester*, 5 Cow. 462; *Zumwalt v. Kansas City etc. Ry.*, 71 Mo. App. 670. But it is said that courts will not inquire into the reasonableness of a municipal ordinance where the legislative authority to pass it exists. In such cases the inquiry is confined to the existence of the power: *Skaggs v. Martinsville*, 140 Ind. 49, 19 Am. St. Rep. 209, 39 N. E. 241, 33 L. R. A. 781; *Haynes v. Cape May*, 50 N. J. L. 1, 13 Atl. 231; *People v. Armstrong*, 73 Mich. 1, 16 Am. St. Rep. 578, 41 N. W. 275, 2 L. R. A. 721; *Grand Rapids v. Brandy*, 105 Mich. 670, 55 Am. St. Rep. 472, 64 N. W. 29, 1 L. R. A. 116. For a general discussion of the subject, see *Wabash v. Defiance*, 167 U. S. 88, 17 Sup. Ct. Rep. 748, 42 L. ed. 87.

X. Who Determines Reasonableness.

The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the court will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained and the necessity or want of necessity for its adoption: *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; *Toledo v. Ry. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *McFarlane v. Chicago*, 185 Ill. 242, 57 N. E. 12; *Zumwalt v. Kansas City etc. Air Ry.*, 71 Mo. App. 670. In *Brooklyn v. Nassau Electric R. R. Co.*, 38 App. Div. 365, it was said that the reasonableness of a municipal ordinance was a question of law and not of fact, although it is to be determined in the light of the facts proved and of common knowledge. And in *Stafford v. Chippewa Val. Electric R. R. Co.*, 110 Wis. 331, 1 N. W. 1086, it was observed that whether in any case where the facts are undisputed, a city council has exceeded its power by the enactment of an unreasonable ordinance, is purely a judicial question, to be considered substantially in the same manner as that whether the legislature has exceeded its constitutional authority, reasonable doubts being resolved in favor of municipal power.

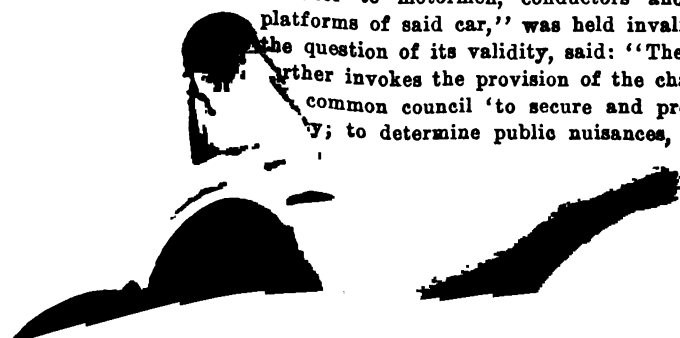
XI. Instances of the Application of the Power to

a. Regulations Prohibiting the Carriage of Freight, Mail.—In *St. Louis etc. R. R. Co. v. Kirkwood*, 159 Mo. 2110, it was held that a railroad company which had been authorized to carry "passengers and property" was amenable to regulations which made it unlawful for a street railway company to carry freight, mail or express within the city, since the privilege of using the streets for the carriage of passengers causes no inconvenience to the traveling public, whereas the use of freight-cars might block the highways and thereby interfere with the use of the streets.

b. Regulations Relative to Equipment of Cars or

1. Relative to Brakes or Fenders.—In the principal case (*Detroit United Ry.*, ante, p. 626), the court sustained, as against an ordinance requiring a street railway company to equip its cars with air or electric brakes, notwithstanding the fact that the ordinance did not designate which should be used. Ordinances requiring the use of fenders do not seem to be questioned on the ground of unreasonableness, although they are sometimes attacked because of particular requirements as to the kind of fenders to be used. In *Brooklyn v. Nassau Electric R. R. Co.*, 38 App. Div. 301, 100 Supp. 609, a provision in an ordinance requiring safety fenders to be attached to front platforms of electric cars, and that the fenders not be more than three inches from the track, was held valid on account of the height of the car above the track being variable according to the load carried, the grades or curves of the tracks. In *Von Diest v. San Antonio Traction Co.* (Tex. Civ. S. W. 632), an ordinance making it unlawful to operate a street-car without an improved fender of the most improved design, and providing that every electric street-car shall have a conductor and motorman, was held to require a fender not only on motor-cars and not on trailers.

2. Requiring Inclosed Vestibules for Motormen.—Regulations requiring inclosed vestibules for motormen seem to be regarded as having a bearing on the safety of the passengers in that they may become imperiled by the motorman becoming chilled. In *Yonkers v. Yonkers R. R. Co.*, 51 App. Div. 301, 100 Supp. 955, an ordinance prohibiting the operation, during the winter months, of any street-car "unless said car shall have a vestibule built upon each end thereof sufficient to afford protection from the weather to motormen, conductors and others standing on the platforms of said car," was held invalid. The court, in deciding the question of its validity, said: "The learned counsel for the motorman further invokes the provision of the charter which confers upon the common council 'to secure and promote the public safety; to determine public nuisances, and to prevent,



and abate the same': Laws 1895, c. 635, tit. 6, sec. 6, subd. 35. The suggestion deserves no serious consideration. So far as any case appears in the case, it preponderates in the direction indicating that the vestibules would be more of a menace than a protection to health and safety. The ordinance, however, was not in the exercise of the power conferred by the section quoted, as its subject matter relate even remotely to the abuses aimed at, either can it be upheld as a valid exercise of the police power. If ever reasonable it may be in itself, it is to be condemned as an abuse of a power not inherent to municipal existence, an interference with the affairs of the defendant which the legislature has not and apparently refused to authorize, and the assertion of a right on the part of the plaintiff which it did not, so far as appears, relate to itself as a condition of the consent to the use of its streets by the defendant."

A statute, however, which required street railway companies, operating electric, cable or steam cars, requiring the constant services of persons on any part of the car except the rear platform, to provide each car with an inclosure which would protect such employes from inclemency of the weather during the winter months was upheld in *State v. Smith*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, as within the police power. The validity of the statute was attacked on a number of grounds. Chief Justice Gilfillan, in delivering the opinion of the court, adverted to the severity of the weather during the winter months, the fact that electric cars run at great rate of speed, that the motorman, being obliged to stand in one place, is unable to protect himself from the cold. He observed that under the circumstances "the position of the motorman is one, not merely of discomfort, but of actual danger to health and sometimes to life, the tendency of which is to disable him to some extent to perform his duties in the way that care to safety of his passengers and of others on the streets requires."

A similar statute applying only to electric cars was upheld in *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068. See, also, *State v. Brown*, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317.

Relative to Change of Motive Power.—In *Taggart v. Newport Ry.*, 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205, the words of the charter of a street railway company provided that the road should be operated by "steam, horse or other power." A subsequent ordinance allowing the company to use electricity as a motive power was held authorized and not imposing a new servitude on the highway.

It was, however, intimated in *City Ry. Co. v. Citizens' R. R.*, 166 U. S. 569, 17 Sup. Ct. Rep. 653, 41 L. ed. 1114, that a city cannot have exceeded its lawful power in authorizing a change from animal power to electricity in the absence of legislative authority. In *State v. Trenton Pass. R. R. Co.*, 58 N. J. L. 666, 34 Atl. 333, 33 L. R. A. 129 (decided in 1896), an ordinance authorizing

a street railway company to use electricity as one of its cars through certain streets, and the erecting purpose was held reasonable. In this connection see *State v. Grundy*, 51 N. J. Eq. 213, 26 Atl. 788; *State v. Janesville St. Ry.*, 87 Wis. 72, 41 Am. St. Rep. 970, 22 L. R. A. 759.

In an early case in Illinois an ordinance directing steam for the purpose of propelling street-cars as a nuisance was upheld where the street was in a town, in the absence of a legislative grant authorizing it. In *People v. Board of R. R. Commrs.*, 32 App. Ill. Supp. 908, the fact that kinetic motors are still in the stages, or that the company operating the street cars is not controlled by persons interested in the motor system was held not sufficient for the railroad commissioners to withhold consent of the cars by that system.

4. Regulating the Stringing of Wires.—Municipalities have authority to make all reasonable regulations governing the use of electric wires in the streets, and to require the use of electric wires in the streets, and to require safeguards to secure the safety and convenience of the lawful use of the streets and the transaction of business. In *State v. Janesville St. Ry. Co.*, 87 Wis. 72, 41 Am. St. Rep. 970, 22 L. R. A. 759. As to the effect of ordinances requiring wires to be insulated, see monographic note to *Hebert Ice etc. Co.*, 100 Am. St. Rep. 523.

5. Requiring Change of Rails or Repaving and Re-laying.—In *Louisville City Ry. v. Louisville*, 8 Bush, 415, it was held that the city of Louisville could require the railway company to lay a tram rail for a crescent rail. It appears that the company was inaugurating a system of street improvements by which the old pavements were being substituted for stone or macadam pavements, and that the tram rail was better rail for street use than the "Nicolson" pavement was used.

And in *Fielders v. North Jersey St. Ry.*, 67 N. J. Eq. 533, it was held that an ordinance, passed under legislative authority, to regulate street railways, requiring such companies to keep in repair to the satisfaction of the proper city authorities any paved street of the city in which their tracks are laid, was a valid police regulation creating a duty toward the public, and that such an ordinance was evidential of the company's obligation to keep its tracks in repair, and that the company by a passenger who was injured by the company's failure to be so repaired by the company, while going on the sidewalk.

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6. Limiting Company to a Single Track.—The direction of the municipal authorities to a street railway company requiring them to maintain but one track between certain points on a named street, instead of a double track as originally authorized by the grant to the company, is not an impairment of the grant, and is valid as a police regulation: *Baltimore v. Baltimore Trust etc. Co.*, 166 U. S. 673, 17 Sup. Ct. Rep. 696, 41 L. ed. 1160. But in *Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144, 31 Am. Rep. 145, the city, by an amendment to the ordinance granting the franchise, sought to limit the street railway company, after it had expended a large amount of money on double tracks, to a single track. The court said: "It is urged that the city, in the discharge of its police power, may forbid the laying of the double track. The question presented by this position is not in this case, for the reason that it is not shown in the pleadings that the proposed double track would operate to the inconvenience of the public or would work injury to the city or any of the people. It is not claimed that the proposed improvement would be a nuisance, nor is it shown that the best interest of the city or the people requires it to be forbidden. If, therefore, the city retains, in the exercise of its police authority, the power to forbid the construction of the double track, the facts present no case for the exercise of that power. It cannot be claimed, surely, that the city, in the exercise of its police power, could deprive the defendant of the right granted by the original ordinance, when the exercise of that right wrought injury to no one. This police authority is not a despotic power that may be exercised without a sufficient public purpose."

c. Regulations Relative to Mode of Operation.

1. Requiring Vigilant Watch by Car Operatives.—An ordinance requiring the motormen on street-cars to keep a vigilant watch for pedestrians approaching the tracks is a police regulation for the protection of the lives and property of the citizens, and is binding upon all corporations which come within its provisions, regardless of whether the ordinance be accepted by the street railway company: *Riska v. Union Depot R. R. Co.*, 180 Mo. 168, 79 S. W. 445. In this connection see, also, *Nagel v. St. Louis Transit Co.*, 104 Mo. App. 438, 79 S. W. 502; *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363, 73 S. W. 379; *Fath v. Tower Grove etc. Co.*, 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; *Murphy v. Lindell R. R. Co.*, 153 Mo. 252, 54 S. W. 442. So, also, it has been held that an ordinance requiring street-car operatives to keep a rigid lookout for teams or persons on or moving toward the track, and "on the first appearance of danger" to stop the car in the shortest time and space possible, should be construed to require the car to be stopped only when it is perceived that collision is imminent, and that when so construed the ordinance is not unreasonable: *Memphis St. Ry. v. Haynes (Tenn.)*, 81 S. W. 374; *Conrad Grocer Co. v. St. Louis etc. Co.*, 89 Mo. App.

391. And in *Gray v. St. Paul City Ry.*, 87 Minn. 286, it was held that an ordinance providing that no person in control of a street-car shall fail to stop the car in time and space possible on the appearance of any obstacle, was unreasonable as requiring the stopping of cars without regard to the safety of passengers, but that it should be confined to the stopping as soon as possible under the circumstances with regard to the safety of the passengers. For a further discussion of the effect of such ordinances, see subdivisions XII and XIII.

2. Requiring the Sounding of Bells or Gongs. In *Chippewa Val. Electric R. R. Co.*, 110 Wis. 331, which was a suit for injuries resulting from a street-car collision with a vehicle, it was sought to introduce an ordinance requiring a bell on each street-car to be rung continuously when in motion upon the street, but the court held that this was void because it was unreasonable. But ordinary ordinances do not seem to be questioned. Thus in *Holt*, 30 Tex. Civ. App. 330, 70 S. W. 591, an ordinance requiring motormen to stop street-cars and ring the bell when approaching the intersection of the street-car track with the track of a railroad was held reasonable on its face.

Most of the questions with respect to vigilant ordinances arise in the course of negligence cases. See also the further adverted to in subdivisions XII and XIII.

3. Requiring Employment of Conductor or Agent or Driver or Motorman.—An ordinance making it unlawful for a horse railroad to run any car without having an agent or driver to the driver, to assist in the control of the car and to prevent accidents and disturbances of the good order of the streets was held a reasonable regulation and within the scope of police power in *State v. Trenton*, 53 N. J. L. 13, 11 L. R. A. 410. A similar ordinance applying to electric cars was sustained in *State v. Sloan*, 48 S. W. 898. In *Von Diest v. San Antonio Traction Co.*, 18 S. W. 632, the court, in sustaining an ordinance requiring a conductor and motorman on every electric car, observed that it was the object of the ordinance was to procure the employment of one man to the propulsion of the car, in order to protect the passengers and those using the streets might be injured. In *South Covington etc. Ry. v. Berry*, 93 Ky. Rep. 161, 18 S. W. 1026, 15 L. R. A. 604, the court sustained an ordinance requiring both a driver and a conductor on every car as a valid police regulation, and properly enacted under the authority of a provision authorizing the passage of all ordinances and regulations for the due and effectual administration of right and justice, and for the better government thereof." The ordinance was struck down because of a provision that the police



should cause any car without a driver and a conductor to be returned to the stable, but the court sustained the provision and held that it was not a taking of the company's property without due process of law.

Although it does not clearly appear in the opinion, the phraseology would indicate that the ordinance applied to horse-cars. It might be doubted whether such a provision would apply to an electric car requiring skill in the operation.

But in *Brooklyn Crosstown R. R. Co. v. Brooklyn*, 37 Hun, 413, an ordinance requiring a conductor as well as a driver on every street-car, and providing a penalty for every violation, was held sufficiently unreasonable to be void. It seems, however, that the ordinance was directed at one-horse cars. The court, in delivering the opinion, said: "There is a wide distinction between regulating the use of the public streets and entering into the management of the private affairs of those who have occasion to use them. The public have a right to the reasonable use of the streets, and if the power to pass this ordinance can be maintained, I see no limit to the obstructions that may be placed on a business, or why a footman and outriders should be required for every private carriage sought to be driven through the streets."

4. **Prohibiting Smoking in Cars.**—In *State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 South. 621, an ordinance prohibiting smoking in street-cars, and making it unlawful for the drivers of a street-car to permit it, was upheld. The court remarked: "There is no doubt of the fact that smoking in the street-cars in the city of New Orleans had caused to the great majority of people using them material annoyance, inconvenience, and discomfort. This is particularly so in the winter season when the cars are closed. There is not only discomfort but positive danger to health from the contaminated air. The record establishes the facts."

5. **Regulating Movements at Crossings.**—A city having general authority under its charter to regulate the use of streets may by ordinance compel electric cars to come to a full stop before crossing intersecting streets: *Cape May etc. Co. v. Cape May*, 59 N. J. L. 404, 36 Atl. 678, 36 L. R. A. 657. The case of *North Birmingham St. R. R. Co. v. Calderwood*, 89 Ala. 247, 18 Am. St. Rep. 105, 7 South. 360, was another instance of such an ordinance, though the validity of the ordinance does not seem to have been questioned.

6. **Limiting General Rate of Speed.**—The right of a municipality to regulate the speed of street railway cars within the corporate limits does not seem to be seriously questioned. An ordinance of that character applying to the operation of electric trolley-cars was sustained in *Cape May etc. Co. v. Cape May*, 59 N. J. L. 404, 36 Atl. 679, 36 L. R. A. 657, as being within the police power. The reasonableness of the provisions of such ordinances is sometimes ques-

tioned. Thus, in *Zumault v. Kansas City etc. Air Li* 670, which, however, was with reference to a subur steam, an ordinance which prohibited trains from b the corporate limits at a greater speed than six mi held unreasonable. The court said: "Within the p the city the ordinance is perhaps well enough, but settled parts thereof it is unreasonable and in restr travel, and cannot be upheld."

And in *United Traction Co. v. Watervliet*, 35 Mi N. Y. Supp. 977, an ordinance was passed prohibiting cars at a rate of speed exceeding six miles an hour. of years a rate of twelve miles per hour had been it was not shown that any accidents had occurred higher rate. Just previous to the passing of the six there had been a heated public discussion of how t secure a reduction of fares. The court held that th one materially impairing the property rights of the pany, subversive of the interests and convenience of that it is unreasonable and therefore void. And *St. Louis etc. Ry.*, 175 Mo. 161, 75 S. W. 86, an ord a franchise and allowing cars to be run over certai rate of twenty miles an hour was sustained, although a previous general speed ordinance limiting the r eight miles an hour.

7. **Relative to Sprinkling of Water, Sand or Salt**
City etc. Ry. Co. v. Mayor, 77 Ga. 731, 4 Am. St. L dinance providing that all railway companies traver must keep their tracks watered so as to lay the d be justified as a police regulation as being "a ver necessary thing for the welfare and convenience of on the streets over which the road is constructed, to its health preserving effect." See, also, *McDonald Ry. Co.*, 74 Fed. 104, to the same effect. In *State City etc. Co.*, 49 La. Ann. 1571, 22 South. 839, 39 I ordinance which made it unlawful for a corporation electric, trolley or other cars or trains on the stre without first providing in some reasonable manner f of the streets through which their cars run," was quiring the railway company to sprinkle the street curb and was held indefinite and unreasonable. *E Canal etc. R. R. Co.*, 50 La. Ann. 1189, 24 South. 2 287, a later ordinance which required such compani tracks so as to effectually lay the dust within its t legal exercise of the police power since it tends comfort and health of both the passengers and the community. And in reply to one of the argumen ordinance the court observed: "It is equally c

which requires that a public business should be so conducted as to be detrimental to the public health, or the cleanliness and comfort of the people of the city, does not deprive the owner of such a franchise of its property without due process of law or adequate compensation."

Newcomb v. Norfolk Western Street Ry., 179 Mass. 449, 142, a requirement in a grant of location to a street railway that the company shall water the street over which the franchise is granted from curb to curb during the time between April and November in each year was held to be an enforceable regulation. An ordinance granting the right to sprinkle sand on the track from November to April, and prohibiting the use of sand during the remainder of the year, was upheld in *Dry Dock etc. R. R. Co. v. City of New York*, 47 Hun, 221. The sprinkling of the sand was for the purpose of securing a better footing for the horses drawing the cars during the months when the pavement was slippery.

An ordinance prohibiting the use of salt on any street railway or any other part of a street or streets in the city except on the tracks leading from one street to another was held valid in *Solidated Traction Co. v. Elizabeth*, 58 N. J. L. 619, 34 Atl. L. R. A. 170, to be a reasonable regulation. It was contended by the street railway company that the use of salt in removing snow from its tracks was not attended with any inconvenience, or with any injurious consequences, and that therefore the ordinance was an arbitrary and unreasonable interference with the business of the company. Testimony was introduced in support of this contention. The appellate court said: "The ordinance with respect to the injurious effects of the use of salt in removing snow and ice from railroad tracks is conflicting and is of such force and effect in favor of prosecutor's [the street railway company] contention as would justify us in condemning the ordinance as an action of the city authorities."

Regarding the Removal of Snow or Ice from Tracks.—It would be held that the right of the municipality to make regulations with respect to the removal of snow or ice from street railway tracks could not be questioned, though, of course, the reasonableness of the manner of removing would be an object of attack. The right of the municipality to make regulations with respect to such removal of snow or ice was recognized in the early case of *Union Ry. Co. v. City of New York*, 11 Allen, 287.

The use of snow-plows or sweepers are prohibited by some ordinances. The case of *Broadway etc. R. R. Co. v. Mayor*, 49 Hun, 100, was a suit for the purpose of prohibiting the enforcement of an ordinance of that kind. The court sustained the ordinance as a valid exercise of the police power. The court said: "The use of snow-plows without question, encumbers the balance of the street, de-

prives the abutting owners of access and egress to the public of the use of the street alongside of the road. The council have the right to prevent this abuse and the railroad companies to cease interfering with the abutting owners, especially when they exercise a right for which can be found in their organic law. The city, therefore, had the right to prohibit the use of such snow-plows and sweeping machines, and they had also the right to require that such use should not be permitted unless a license is granted by the mayor so to do. So far there is no delegation of police power, but this is merely a regulation of the use over which the city has complete control. But it is said that a subsequent ordinance goes further than this and provides that no person or corporation shall use such snow-plows or machines was to be done without the consent of the mayor, the mayor is to determine and be the sole judge as to how the license shall be granted. It may be true that the ordinance is subject to the criticism passed upon it, but the balance remains in force." The case of *Ovington v. Ry.*, 133 Mass. 440, 41 N. E. 767, was an instance of a similar ordinance, which prohibited the use of snow-plows without the consent of the superintendent of streets or the city engineer. The question arose in a suit for injuries resulting from a person being frightened from a pile of snow turned up by the plow. The validity of the ordinance was not questioned. The general subject of the duty of a street railway company to clear snow from its tracks, see the note to *Western Pacific Ry. Co. v. Citizens' Street R. R. Co.*, 25 Am. St. Rep. 480.

3. **Affecting Right of Way as Against Fire Department.**—In *North Jersey St. Ry. (N. J.)*, 57 Atl. 423, it was held that the giving of a right of way to a fire department and vehicles "may be granted by legislative enactment or by ordinance, in so far as the ordinance is not in conflict with the statute, and to the extent at least by municipal regulation."

Fire departments are generally given the right to use the streets for their vehicles except those carrying the United States mail. See *New York v. Metropolitan St. Ry.*, 90 App. Div. 66, 683, for an instance of a statute of that character.

XIII. Construction of Ordinances Attempting

1. **General Rules of Construction.**—In a general case, it was said that the general rules of construction applicable to statutes also apply to ordinances. In *Matter of Frazee*, 63 N. Y. 310, 30 N. W. 72, it was said that, to be valid, an ordinance must be capable of construction and be in harmony with constitutional principles and in harmony with the laws of the state. Also it is said that ordinances must be construed not in such a way as will be repugnant to the laws of the state.

sense. Thus it was held that an ordinance, making it unlawful to operate a "street-car unprovided with a car-fender of the most improved design and construction," and providing that no electric car shall be operated "without having one conductor and one motorman thereon," would be construed to require a fender and motorman only on motor-cars and not on "trailers": *Von Diest v. San Antonio Traction Co.* (Tex. Civ.), 77 S. W. 632; and ordinances will be construed with reference to the generally accepted meaning at the time of their passage. Thus an ordinance passed in 1860 limiting the speed of street-cars to eight miles an hour and prescribing the duties of drivers was construed in 1892 not to apply to cable-cars: *Glenville v. St. Louis R. R. Co.*, 51 Mo. App. 629. In the principal case (*People v. Detroit United Ry.*, ante, p. 626), it was said an ordinance showing on its face that it contemplates providing a safeguard against danger to the public will be presumed to be valid, and the burden is on the person attacking its validity. See, also, *Cape May etc. Co. v. Cape May*, 59 N. J. L. 404, 36 Atl. 678, 36 L. R. A. 657, to the same effect. Where the provisions of an ordinance are separable, the whole will not be declared void because of the unconstitutionality or invalidity of a part: *St. Louis v. St. Louis R. R. Co.*, 89 Mo. 44, 58 Am. Rep. 82, 1 S. W. 305; *Detroit v. Ft. Wayne etc. R. R. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580, 59 N. W. 958, 20 L. R. A. 79; *Magneau v. Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436, 47 N. W. 280, 9 L. R. A. 786; *Broadway etc. R. R. Co. v. Mayor*, 49 Hun, 133, 1 N. Y. Supp. 646. If an ordinance is based upon a general power, and its provisions are more specific and detailed than the expressions of the power conferred, the courts will look into the reasonableness of its provisions: *State v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

b. Construction of Ordinances Relative to Equipment and Operation.—In the principal case (*People v. Detroit United Ry.*, ante, p. 626), the court refused to declare an ordinance requiring cars to be equipped with air or electric brakes invalid merely because it was shown that electric brakes were inefficient, and that the ordinance did not designate between air and electric brakes.

And in *Von Diest v. San Antonio Traction Co.* (Tex. Civ. App.), 77 S. W. 632, the motor-car and trailer were held to be one car within the meaning of a fender ordinance.

An ordinance providing that electric cars shall be provided with a suitable gong and a good and sufficient headlight from and after the hour of 6 P. M., and that the gong shall be sounded before reaching crossings, was held to relate to all hours of the day as far as sounding of the gong was concerned: *San Antonio St. R. R. Co. v. Mechler* (Tex. Civ. App.), 29 S. W. 202. The term "street crossing" as used in an ordinance requiring a bell to be rung by street-car operatives when twenty-five feet from any street crossing, was held to require the ringing of the bell where one street inter-

change, 91 Wis. 360, 51 Am. St. Rep. 912, 64 N. W. 1041, 30 A. 504.

decisions on the subject are by no means harmonious, and as it is doubtful whether decisions holding such violations constitute negligence per se can be said to be a method of enforcing such ordinances, we will not pursue the subject any further. We cite some of the cases in which the subject has been discussed. Thus the effect of violating an ordinance requiring motor-keep a vigilant watch was discussed in *Dallas Rapid Transit Elliott*, 7 Tex. Civ. App. 216, 26 S. W. 455. The failure to observe an ordinance requiring the sounding of the gong was an issue in *Ford v. Chippewa Val. Electric R. R. Co.*, 110 Wis. 331, 85 1036. The failure to have a headlight in connection with an ordinance requiring "colored signal lights in front and rear" was an issue in *McGee v. Consolidated St. Ry.*, 102 Mich. 107, 47 Am. St. Rep. 507, 60 N. W. 293, 26 L. R. A. 300. The effect of a failure to employ a conductor in the car as required by ordinance was raised in *Chicago West Division Ry. v. Hair*, 57 Ill. App. 587. As to the effect of ordinances requiring electric wires to be insulated, see the graphic note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 523. The effect of violation of ordinances regulating the rate of speed was adverted to in the following cases, viz.: *London Electrical etc. Co. v. Hewitt*, 139 Ala. 442, 101 Am. St. Rep. 2, 36 South. 39; *Baltimore etc. Ry. v. McDonnell*, 43 Md. 534; *Worcester v. South Boston Horse R. R. Co.*, 129 Mass. 310; *Weber v. St. Louis City Cable Ry.*, 100 Mo. 194, 18 Am. St. Rep. 541, 12 S. W. 33, 3 S. W. 587, 7 L. R. A. 819; *Hogan v. Citizens' Ry. Co.*, 150 Mo. 3, 51 S. W. 473; *Holden v. Missouri R. R. Co.*, 177 Mo. 456, 76 973; *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363, 73 379; *Holden v. Missouri R. R. Co.*, 108 Mo. App. 665, 84 S. W. 33; *Fry v. St. Louis Transit Co. (Mo. App.)*, 85 S. W. 960; *St. Louis St. Ry. v. Duvall*, 40 Neb. 29, 58 N. W. 531; *San Antonio Ry. v. Watzlavzick (Tex. Civ.)*, 28 S. W. 115; *Riley v. Salt Lake City Ry. & N. Co.*, 10 Utah, 428, 37 Pac. 681; and with reference to the effect of violations of ordinances regulating street crossings in connection with speed ordinances, see *St. Louis Transit Co.*, 108 Mo. App. 424, 83 S. W. 992; *Deitrich v. St. Louis Transit Co. (Mo. App.)*, 85 S. W. 140; *Cumming v. City of New York*, 104 N. Y. 669, 10 N. E. 855.

Criminal Prosecutions for Violation of Regulating Ordinances.

The power to enact an ordinance involves all the incidents necessary to give effect to it. Therefore, a municipality has an implied power, irrespective of statutory authority, to provide for the enforcement of its ordinances by reasonable and proper fines: *Detroit Ry. & M. Co. v. Wayne etc. Ry. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580, 54 958. For a discussion of what acts may be declared criminal see *Am. St. Rep.*, Vol. 104—42

For references see bibliography note to Book v.
See 121

The procedure is recommended for violation of
any regulations for the operation of street-cars is
as for the violation of other ordinances of a kind
violation of the ordinance is very often attacked
that it is unnecessary, as is shown by the same
which that question has been raised.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

**ENERY v. QUINCY, OMAHA AND KANSAS CITY
RAILROAD COMPANY.**

[92 Minn. 20, 99 N. W. 365.]

ATTACHMENT.—A Car of a Foreign Railroad corporation, with freight into this state, and here remaining a reasonable time for reloading and sending back to the state from which it is not subject to an attachment issued in an action in the courts of this state. (p. 662.)

J. Smith, Rome G. Brown and Charles S. Albert, for the plaintiff.

George C. Stiles, for the respondent.

LOVELY, J. Appeal from an order denying a motion to grant a writ of attachment under which one of defendant's freight-cars was seized in an action for an alleged delay in forwarding a consignment of strawberries shipped from a point on defendant's road in Missouri to be sent through successive day carriers to Minneapolis.

The complaint alleges a cause of action which, if established, would entitle plaintiff to recover for an alleged negligent delay in transmitting ²² perishable goods to the consignee, but it is claimed by the moving party that the property levied upon, although owned by the defendant and within this state, was not subject to the processes of our courts. The defendant company is a railway corporation of Missouri, had no line of road or office in this state, and did no business herein, its only property being the car in question temporarily within our boundaries to be returned as soon as its errand was fulfilled.

From the facts established on the hearing appears that an agreement existed between the company and the intermediate subsequent common carrier, the defendant, instead of unloading and transferring the goods at the points of connection or at state lines, to keep the goods in question to be hauled to the place of destination, breaking bulk or discharging its contents until it was ready to return it as soon as practicable, to the point on or near its line in Missouri; that the car in question was used by the carriers bringing it into this state from the Minnesota Transfer Company, an independent carrier here, paying to the first carriers for the use of the car a per diem or mileage; that this method of returning cars facilitated traffic, which is claimed to be a substantial accommodation to the shipping public, and is in accordance with the system of freight transportation adopted throughout the United States. Under this custom it is claimed that the car in question had been used in an interstate shipment of goods therein from St. Louis to points in North Dakota, and Montana, and at the time it was seized awaiting reloading by the Minnesota Transfer Company yard with a return shipment to points in Missouri. If the car was in fact empty when seized, it appears that there was no unreasonable or unnecessary delay in securing its return according to the regular course of business, and that it was a part of the actual equipment of the foreign carrier or corporation to which it belonged.

Under our statute, although a cause of action may be arisen in this state, jurisdiction of a foreign corporation may be acquired by our courts through service of process on one of its officers or agents who may be found in this state. If it has property here; otherwise not: Gen. Stat. § 5200. But within the sensible intent of the statute, the property must be of a kind and value to justify the seizure, and the probability that the creditor can secure some benefit from the sale thereof which may be applied to the judgment. In *St. Louis & N. W. Ry. Co. v. American Ry. Co.*, 81 Minn. 346, 84 N. W. 46. It was provided that, where a foreign corporation has property in the state, a creditor may acquire a lien on such property.

ment or garnishment, but only to the extent of the property at the time the jurisdiction acquired thereby attaches: Stats. 1894, sec. 5211.

Strictly speaking, the freight-car which was seized in this case is actually property owned by defendant corporation, and a technical reading of this statute was subject to attachment or garnishment; but we do not think this conclusion absolutely follows in all cases. We have held that the property of a nonresident within the state, while strictly subject to garnishment, as, for instance, in the case of a common carrier receiving goods consigned for transit to a place outside the state, is not amenable to such process: *Stevenot v. East-land Ry. Co.*, 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600; *Winn v. Great Northern Ry. Co.*, 81 Minn. 247, 83 Am. St. Rep. 370, 83 N. W. 986, 51 L. R. A. 640.

From the cases above cited from this court it would follow that we should not give such literal interpretation to our statute as to securing jurisdictional powers as would overcome by artificiality the mere presence of property here which has practically been enforced under exceptional circumstances that required the presence temporarily to meet the necessities of commerce, public policy, and is made essential to secure benefits for citizens, where its presence is not intended to serve any other purpose. Under the laws of this state common carriers of business herein are required to establish joint through bills of lading and transfer through carload shipments to their destinations without unloading: Laws 1887, p. 50, c. 10, sec. 3. The general government has expressly required that the movement of freight railway cars shall not be stopped or delayed at the point where the lines of such railway companies cross the borders of the states, or at the point where the carriers deliver the cars to the next connecting carrier; but that shipments shall go forward from the originating point to their destination in the cars in which they are first loaded: U. S. Rev. Stats., sec. 5258; 3 S. Comp. Stats. 1901, p. 3564.

* Under the interstate commerce act (so called) it is provided in terms: "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break or bulk, stoppage or interruption made

by such common carrier shall prevent the carriage from being treated as one continuous carriage from shipment to the place of destination, unless such page or interruption was made in good faith for any necessary purpose, and without any intent to avoid or interrupt such continuous carriage or to evade any provisions of this act": 24 Stats. 382, c. 104.

These well-known provisions of law are express of a universal condition that exists upon all the railway country, and without giving them effect and permitting way carriers from other states to come into our borders goods which are shipped here, and return without being retarded, or so treated that the carriers to protect themselves against litigation away from home must transfer the use of such cars to others at the state line, would be of the greatest detriment to the business interests of the citizens, and be violative of the terms and spirit of the law to which we have referred.

It follows that we cannot justify a constructive attachment or garnishee statutes that would effectuate the result, and, while it was a part of the contract between the independent corporation in this state and the connecting corporation, the freight-cars should be reloaded and within a reasonable time returned, this custom was but a practical method of compensation for bringing the car into and out of the state, the necessary effort for continuous and unbroken transit is essential to the purposes of traffic and interstate commerce, hence it should not be treated as property subject to attachment.

This subject has been thoroughly and exhaustively discussed in two recent cases, and the reasoning therein with the above suggested meets our approval: *Michigan etc. R. R. Co. v. Chicago etc. R. R. Co.*, 1 Ill. App. 399, 404; *Ward v. Va.* 52 W. Va. 485, 94 Am. St. Rep. 948, 44 S. E. 29.

²⁵ Had the car seized in this case been delayed, it was necessary in the course of business to return it to the place from whence it came, or had it been diverted without to other uses and purposes exceptional to its presence here, the demands of interstate commerce with the consent of the connecting corporation, a different proposition would be presented. In practically it was engaged in a transit into and out of the state upon such reasonable conditions as ought not to be considered as such property conditions and characteristics as

to seizure in coming into and returning from the state for the purposes of giving jurisdiction to litigants here who otherwise would be compelled to contest their causes of action in the tribunals where the property had its undoubted legal

order refusing to vacate the attachment is reversed and the case remanded.

ATTACHMENT OF FOREIGN RAILROAD CARS.*

The rolling stock of railroads is regarded by some authorities as realty (notes to *Randall v. Elwell*, 11 Am. Rep. 751; *Emman on Executions*, sec. 114), and by others as personalty: *Hall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747; *Coe v. Columbus R. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518. Under the statutes of Massachusetts, railroad cars are, for purposes of attachment, real property, and a special mode is provided for attaching them. *Hall v. Carney*, 140 Mass. 131, 3 N. E. 14. In New Hampshire they are, when not in use, subject to attachment: *Boston R. R. Co.*, 37 N. H. 410, 72 Am. Dec. 336.

The question whether the rolling stock of a railroad is personal or real property, as applied to the cars of a foreign corporation, arose in *Buffalo Coal Co. v. Rochester etc. Ry. Co.*, 8 Week. Not. Cas. (Pa.)

The cars in that case belonged to a railway corporation incorporated and operated in New York, and were seized under a writ of attachment when they were run into Pennsylvania. They were held to be personal property and properly attached, against the contention that they were real property and that the remedy of a creditor was by process of sequestration.

The supreme court of California has held that a receiver appointed in a foreign jurisdiction to take possession of the property of a railway corporation and carry on its business who, in pursuance of authority as receiver, has taken a freight-car into his actual possession, within the jurisdiction of the court by which he was appointed, cannot hold it against the claim of a citizen of California, upon finding the car in that state, has, in pursuance of its laws, seized it to be attached for his just demands against the railroad company: *Humphreys v. Hopkins*, 81 Cal. 551, 15 Am. St. Rep. 76, Pac. 892, 6 L. R. A. 792.

The effect of the attachment of foreign railroad cars as an interference with public service or with interstate commerce does not seem to have been considered in the above California and Pennsylvania cases. But in *Michigan Cent. R. R. Co. v. Chicago etc. R.*

*REFERENCES TO MONOGRAPHIC NOTES.

Seizure of carriers for goods in transit: 50 Am. St. Rep. 465-467.

Seizure of municipalities for the salaries of public officers: 96 Am. St. Rep. 462.

R. Co., 1 Ill. App. 399, it is decided that a railroad is liable to garnishment for cars received from a connecting line by an arrangement by which, instead of unloading and reloading the freight from the cars of one corporation to the cars of another at points of connection, each receives from the other cars loaded with freight, and hauls them to the place of destination on the road, and after discharging the freight returns the cars to the first road, practicable in the due course of business; and the decision is based on the ground that such an interference by creditors with the operations of common carriers is in the exercise of their public rights, and is opposed to public policy.

In the recent case of *Wall v. Norfolk etc. R. R. Co.*, 485, 94 Am. St. Rep. 948, 44 S. E. 294, 64 L. R. A. 501, the court was of the opinion that the rolling stock of a railroad, being a public law, is, because devoted to a public service, exempt from attachment, but the court was further of the opinion, that, under a provision making the rolling stock or other movable property of any railroad, or other corporation within the state, subject to execution and sale in the same manner as the personalty of an individual, the rolling stock of a railroad, or other corporation, whether foreign or domestic, within the state, is subject to the process of attachment. The court holds, however, that a railroad car is not liable to garnishment for cars received from a connecting line under the running arrangements commonly existing between connecting carriers.

It will be noted that in the principal case, ante, p. 663, it was held that a car of a foreign railroad corporation, sent within the state of Minnesota over a connecting line, and there remaining for a reasonable time for reloading and sending back to the state from which it came, is not subject to an attachment issued in an action in the courts of Minnesota. This decision is grounded on the ground that to allow such an attachment would be an unwarranted interference with interstate commerce; and it is in line with *Wall v. Norfolk etc. R. R. Co.*, 52 W. Va. 485, 94 Am. St. Rep. 948, 64 L. R. A. 501, holding that railroad cars engaged in carrying freight from another state into the state, to be returned to the former state in the transaction of interstate commerce, are not subject to attachment in the hands of the owner or lessee, when in the hands of a connecting carrier within the state, and that the clause of the federal constitutional bill of rights, of the commerce clause in the federal constitutional act, and the state commerce act of Congress.

ANDERSON v. FIELDING.

[92 Minn. 42, 99 N. W. 357.]

EMPLOYER'S LIABILITY for Defective Appliances—Custom.—That a negligent act will not be excused because customary, though proof of custom is evidence, but not conclusive, as to whether the act is negligent, applies to the act of an employer in buying and furnishing tools and appliances for the use of his employees. (p. 668.)

EMPLOYER'S LIABILITY for Defective Appliances—Promise to Repair.—An employé is not chargeable with the assumption of the defect with contributory negligence, as a matter of law, by continuing to use for a reasonable time a machine or appliance which he knows to be unsafe, and appreciates the risk of using, where he has complained to the employer, and the employer has promised to remedy the defect, unless the danger is so imminent that a man of ordinary prudence would not longer to use it until made safe. A reasonable time, within which the promise is any period which does not preclude all reasonable expectations that the promise may be kept, and is generally a question of fact. (pp. 668, 669.)

EVIDENCE—Admissibility of Expert Testimony.—Whenever the subject of inquiry is a matter which lies so far outside the range of common knowledge and experience that the jury are practically unable to pass upon it intelligently without the assistance of persons possessing peculiar skill and knowledge, expert testimony, opinion or opinion evidence is admissible; but such expert testimony is not admissible where the facts are such that, when explained before the jury and explained to them, they are as competent as the experts to form an opinion. (p. 670.)

EMPLOYER'S LIABILITY.—Expert Testimony is admissible, in an action by an employé for personal injuries sustained by a fall, whether a block and hook constituting a part of an apparatus supporting himself while painting high structures was reasonably safe. (p. 671.)

ABATEMENT of Action for Personal Injuries by Death.—Actions declaring that actions for personal injuries die with the person, except that, when death is caused by a wrongful act, the personal representative may maintain an action for the injury, provided that, if an action has been commenced by such deceased in his lifetime for such injury, it may be continued by his personal representative, or the personal representative of the deceased, and the facts warrant, to be substituted as plaintiff in the original action brought by the deceased, and convert it by amendment of the pleadings into an action for the benefit of the widow and next of kin, and do not authorize such substitution for the purpose of prosecuting the original cause of action which accrued to the deceased in his lifetime. (p. 673.)

J. C. Olmstead and C. H. Taylor, for the plaintiff.

W. H. Clapp & Macartney and Franklin H. Griggs, for the defendant.

43 START, C. J. John Anderson, the original plaintiff in this action, hereinafter referred to as the plaintiff, of some fourteen years' experience, and accustomed to work on masts, yards, smokestacks, and fighting tops on warships, came to the city of St. Paul in 1902, and in May 1902 was employed by the defendants in painting the bridge over the city across the Mississippi river. His work was to be suspended one hundred and sixty feet above the water, and while he was so employed he fell, and sustained personal injuries. He brought this action to recover damages for such injuries, alleging that they were caused by the negligence of the defendants in furnishing unsafe tools and appliances to be used by him in doing the work assigned to him.

The specific charge of negligence alleged in the complaint, and relied upon as the basis of his cause of action, was that the block or pulley which was a part of the apparatus by which he was supported while at work was so constructed as to be supported by a single stationary hook, without swivel or other device to prevent the block from unhooking and falling over the side over which it was intended to be placed. The complaint also alleged that the plaintiff objected to use such a block, and so informed the defendants' foreman, and of the danger and insufficiency; that thereupon the defendants' foreman promised to furnish for his use a safe tackle consisting of double hooks, as he had suggested, and requested the plaintiff to use in the meantime the block with the single hook; and, further, 44 that the plaintiff relied on the promise and proceeded to use with due care the block and tackle furnished, and while so doing the block, with the single hook, of its defective and unfit condition, slipped off the support to which it was attached, causing the plaintiff to fall to the water below, thereby breaking his thigh, bruising his head, and seriously and permanently injuring him.

The answer denied the alleged negligence and negligence, and affirmatively alleged that all of the appliances and tackle used in the use of the plaintiff were safe and sufficient, and that the injury was caused by his own negligence.

A trial of these issues resulted in a verdict in favor of the plaintiff for the sum of four thousand dollars.

The defendants, upon a settled case, made a blended motion for judgment notwithstanding the verdict, or for a new trial.

The court, on April 20, 1903, made its order denying the motion.

, but granted the motion for a new trial. The defendant appealed from the whole order April 27, 1903. The plaintiff died on September 25, 1903, and the administrator of his estate was on December 31, 1903, substituted as plaintiff in the action, and appealed from the order on January 14, 1904, upon notice of the making of the order not having been served upon the plaintiff. The defendants urge in support of their appeal that the trial court erred in denying their motion for judgment, and the administrator on his appeal urges that the court erred in granting a new trial.

The defendants' appeal will be first considered. It does not raise the question whether the evidence was such that the court ought, in the exercise of a fair discretion, to have granted a new trial. The question is whether the defendants are entitled to judgment as a matter of law. Two general propositions are urged by them why their request for a directed verdict in their favor should have been given. If either is correct, then the defendants are entitled to a judgment notwithstanding the verdict; otherwise not.

The first proposition is that the evidence conclusively shows that the defendants exercised ordinary care to procure and furnish for the plaintiff's use a block and hook which was reasonable and safe for the purposes and the place in which he was required to use it. The measure of the defendants' duty in the premises was ordinary care; that is, the ⁴⁵ care which every prudent man is expected to and would employ under like circumstances. The construction of the hook in the block and its inability to unhook constituted the defect of which the plaintiff complained, and its selection and use by the defendants instead of a double hook, which it was claimed was absolutely safe, constituted the defendants' alleged negligence. There was no question but that the block and hook furnished was in good condition, the objection being to its kind and construction. Such as to the claim of the plaintiff, the defendants gave evidence which was undisputed showing that the hook in question was the only kind used for the same purpose the plaintiff was using when injured, and that it was the usual and customary one used for like purposes.

Evidence of common and general use of a particular appliance is competent on the question of its reasonable safety, and also on the question whether an employer selecting and furnishing it to his employé exercised ordinary care. Counsel claims that such evidence, if uncontradicted, is conclusive in favor of

the employer on the question of his alleged negligence. If this be so, then it follows that there was no negligence on the part of the defendants, and that the trial court erred in granting their motion for judgment. The contention of the defendants is in support of many decisions in other jurisdictions, but it is not the rule adopted by this court. The law of this state is that a negligent act will not be excused by the fact that it is customary. Proof of custom, however, is evidence, but not conclusive, as to whether the act is negligent. This is the case in the act of selecting and furnishing tools and appliances for the use of employes: *Craver v. Christian*, 36 Minn. 289, 43 Minn. 289, 45 N. W. 440; *Flanders v. Chicago & North Western Ry. Co.*, 51 Minn. 193, 53 N. W. 544; *Lawson v. Truesdale*, 51 Minn. 193, 53 N. W. 544; *Hinton v. Eastern Ry. Co.*, 72 Minn. 410, 62 N. W. 546; *Attix v. Minnesota Sandstone Co.*, 85 Minn. 75, 75 N. W. 373; *Attix v. Minnesota Sandstone Co.*, 85 Minn. 75, 75 N. W. 373; *Attix v. Minnesota Sandstone Co.*, 85 Minn. 75, 75 N. W. 373; *Attix v. Minnesota Sandstone Co.*, 85 Minn. 75, 75 N. W. 373.

Again, it is claimed that it conclusively appears from the evidence, including the plaintiff's own testimony, that the injury was not caused by the unhooking of the appliance. The block and hook was an exhibit on the trial, and it was used to illustrate the testimony of the plaintiff and other witnesses. It was also so used on the argument in this case. The court are of the opinion, based upon an examination of the evidence, and the whole evidence relevant to the question of the plaintiff's fall, that it was one of fact for the jury to find accordingly hold that the question whether the defendant was guilty of negligence in failing to furnish for plaintiff reasonably safe appliances, and whether such failure was the cause of his injury, was not a question of law, but one for the jury.

2. The defendants' second proposition is to the effect that the plaintiff was conclusively guilty of contributory negligence in continuing to use the block and hook for so long a time as he did after he knew, as he claims, that it was defective, unsafe, and unsound, and that it was defective, unsafe, and unsound, and that the defendants had failed to remedy it. A person is chargeable with the assumption of the risk or with negligence as a matter of law by continuing to use a machine or appliance which he knows to be unsafe, and appreciates the risk of using it, where he is warned of it, and the master has promised to remedy it, unless the appreciated danger is so imminent

ordinary prudence would refuse to longer use it unless it made safe. A reasonable time, within the meaning of this, is any period which does not preclude all reasonable expectations that the promise may be kept: *Greene v. Minneapolis Ry. Co.*, 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378; *Lyberg v. Northern Pac. R. Co.*, 39 Minn. 15, 38 N. W. ; *Schlitz v. Pabst Brewing Co.*, 57 Minn. 303, 59 N. W. ; *Rothenberger v. Northwestern C. M. Co.*, 57 Minn. 461, N. W. 531; *Harris v. Hewitt*, 64 Minn. 54, 65 N. W. 1085; *St. v. Houston*, 81 Minn. 174, 83 N. W. 533; *Gray v. Red Lake Falls L. Co.*, 85 Minn. 24, 88 N. W. 24.

In this case the plaintiff continued to use the block and hook some two weeks after the first promise to substitute one with a double hook. But his testimony tends to show that the defendants' promise was repeated several times, and that on the last time the plaintiff called attention to the delay in getting a new block with a double hook he was assured that it had been ordered, and was expected "any time now." This was about two days before he was injured. We are of the opinion that whether the plaintiff continued to use the defective block and hook longer than a reasonable time, and whether the danger of using it was so imminent that no man of ordinary prudence would continue ⁴⁷ to use it in reliance on the defendants' promise to remedy the defect, was, upon the evidence, not a question of law, but one of fact, which was properly submitted to the jury. We therefore hold that the defendants' motion for judgment notwithstanding the verdict was properly denied.

3. This brings us to the plaintiff's appeal, which presents the question of the correctness of the order of the court granting a new trial of the action. If prejudicial errors of law occurred in the trial, the order, so far as it granted a new trial, was right. The plaintiff, over the objection of the defendants, was permitted to give his opinion as an expert that the block and hook in controversy was not a reasonably safe appliance for the work assigned to him, but that a block with a double hook was. The defendants called four witnesses shown to be competent to express an opinion on the question, and severally asked them whether, in their opinion, the block and hook in question was a reasonably safe appliance with which to do the work assigned to the plaintiff. The objection of the plaintiff to the questions being answered was sustained. The court also excluded the testimony of a competent witness called by the d-

pendants to the effect that the double hook was unhook than the single hook in controversy. No the learned trial judge, "There cannot be two rules plaintiff and one for the defendants, but one rule. It is thus clear that there was prejudicial error of the court, and that, in any event, a new trial granted.

With a view to such trial, it is necessary to determine the court erred in receiving the plaintiff's expert in excluding that of the defendants. Whenever a cause the subject of inquiry is a matter which lies outside the range of common knowledge and experience jury are presumably unable to pass upon it intelligently without the assistance of the opinion of persons possessing skill and knowledge in the premises, expert or otherwise, is admissible. But such evidence is not admissible where the facts are such that, when placed before the jury to determine them, they are as competent as the experts to form their own conclusions.

There is no controversy as to this rule, but there is in its application, which is illustrated by the following cases. In *Krippner v. Biebl*, 28 Minn. 139, 9 N. W. 1026, evidence was held to be admissible to show how long it would take a fire break. In *Davidson v. St. Paul & Northern Pac. Ry. Co.*, 51, 24 N. W. 324, expert evidence was held to be admissible to show how long sparks from a locomotive will burn and communicate fire. Whether the arrangement of the coupling near each other was dangerous was held to be a question for experts in the case of *Freeberg v. Minneapolis & St. Paul Ry. Co.*, 48 Minn. 99, 50 N. W. 1026. The propriety of ice tongs was held not to be a matter of such complexity as to preclude expert testimony as to the safety of the same in *v. Northern Pacific Ry. Co.*, 60 Minn. 130, 6 N. W. 1026. Again, in *Olmscheid v. Nelson-Tenney Lumber Co.*, 61, 63 N. W. 605, it was held that expert testimony was competent on the question of the safety of a belting without a carriage attachment. Such evidence was held to be admissible on the question whether it was practicable to put a machine on a machine: *Peterson v. Johnson-Wentworth Co.*, 72 N. W. 510. Whether the method adopted by the plaintiff in "shucking snow" was proper was held in *Sibley v. Northern Ry. Co.*, 76 Minn. 269, 79 N. W. 95, to be a question on which opinion evidence was admissible. The propriety of operating a hydraulic pressure lift or elevator was held to be a question for experts in *Wentworth v. Johnson-Wentworth Co.*, 72 N. W. 510.

required to operate it, are questions as to which expert opinion is competent: *Nutzmann v. Germania Life Ins. Co.*, 101 Minn. 504, 81 N. W. 518. In the case of *Thiel v. Kennedy*, 101 Minn. 142, 84 N. W. 657, it was held that the proper conclusion of a belt shifter was a matter as to which opinion evidence was proper.

Now, the block and hook here in question is, taken by itself, a simple principle in its construction as a pair of ice tongs, and, if the question was merely whether it could be unhooked, expert evidence would be inadmissible, for anybody would see at a glance whether it could be. But the question for the jury was whether it was a reasonably safe appliance for the doing of the particular work assigned to the plaintiff, and whether the single hook in actual use was as safe as the double hook. Whether or not the single hook in such actual use was likely to unhook, the weight upon it of the weight of the operator, or of his swinging himself around so as to paint all parts of the bridge within his reach, at the same time supporting himself wholly or in part with his legs and hand, were not matters of such common knowledge and experience as to exclude opinion evidence. They were questions of special experience⁴⁰ and knowledge than those in the cases we have cited. We hold that it was proper for the trial court to exclude the opinion evidence offered by the defendants, and that the order granting a new trial was correct.

One other matter remains to be considered. A motion on behalf of the administrator of the estate of plaintiff was made to substitute him in place of the deceased plaintiff. This was proposed by the defendants, but the motion was pro forma granted, with leave to the defendants to argue the motion on its merits on the hearing of the appeal. Their proposition is briefly stated, that the administrator based his right to be substituted upon the claim that the cause of action set forth in the complaint herein by virtue of Laws of 1897, page 487, chapter 261, survived to the personal representative of the plaintiff, and that this contention cannot be sustained, because the cause of action died with the plaintiff; hence the action abated. The administrator was properly substituted for two reasons: it was the defendants' duty, as appellants, as a condition precedent to the hearing of their appeal, to have the administrator substituted as respondent: Gen. Stats. 1894, sec. 6153. Again, the administrator had the right to be substituted so as to prosecute this appeal to set aside the order granting a new trial and

to restore the verdict in favor of the plaintiff, for the verdict would be an asset of the estate: *Cooper v. City of St. Paul*, 55 Minn. 134, 56 N. W. 588.

But, having reached the conclusion that the case from must be affirmed on both appeals the case remanded to the district court stand just as if the plaintiff commenced the action, and died before trial, for it has not been set aside, a new trial granted, and the case is as if there had never been any trial: *St. Anthony v. Graham*, 67 Minn. 318, 320, 69 N. W. 1077. So the question of the case, does the action abate? The question involves a construction of Laws of 1887, chapter 261. Section 5912 declares that every cause of action arising out of an injury to the person dies with the person, except as provided in the next section (5913). Section 5913 provides that when death is caused by the wrongful act or omission of a party, the personal representatives of the deceased may maintain an action for the injury, if he could have maintained it if he had lived, and if the action be commenced within two years after such act or omission. The damages cannot exceed five thousand dollars, and must be given to the widow and the next of kin, for the support of the deceased and funeral expenses. The demand for the support of the deceased and funeral expenses allowed by the probate court shall be first paid: "Provided, that if an action had been commenced by such deceased person during his lifetime for such injury, and had not been finally determined, such action does not abate by the death of the plaintiff, but may be continued by the personal representatives of the deceased, for the benefit of the widow and next of kin, and limited to the same amount of recovery as if the action had been commenced by the deceased, provided, and the court on motion may allow the action to be continued by such personal representatives and order judgment to be entered and issues made conformably to the provisions of this chapter brought under the provisions of this chapter."

This last proviso is chapter 261, page 487 of the Laws of 1887. Does it mean, as counsel for the administrator claims, that the personal representatives of the deceased may maintain an action for the injury to the person, if he could have maintained it if he had lived, and if the action be commenced within two years after such act or omission, which would otherwise die with the person, and the court on motion may allow the action to be continued by such personal representatives and order judgment to be entered and issues made conformably to the provisions of this chapter brought under the provisions of this chapter?

for the survival of two actions for the same injury resulting in death. It is improbable that the legislature intended such result by the proviso. Nor is a construction which authorize the substitution of the personal representative to prosecute the actions accruing to the deceased by reason of injury consistent with either the language or obvious purpose of the proviso. Why amend the pleadings if the personal representative succeeds to the cause of action of the deceased in his complaint? Or why, if such be the case, limit the amount of the recovery to five thousand dollars? The cause of action accruing to the deceased in his lifetime was not so limited. The cause of action given by section 5913 is an original statutory action for the benefit of the widow and next of kin of deceased to recover their pecuniary loss on account of his death. See *Schwarz v. Judd*, 28 Minn. 371, 10 N. W. 208. ⁵¹ Now, the action which the personal representative is authorized by the proviso to prosecute is the common-law action which the deceased had a right to maintain, and which would die with him. If, for the proviso, why was not the proviso added to section 5912 providing that a cause of action arising out of an injury to a person dies with him? Again, in cases where the deceased commences an action for recovery of damages sustained by him, and he dies two or more years after his injury resulting in his death, but before the final determination of the action, the cause of action by the personal representatives for the benefit of the widow and next of kin would be barred except for the proviso, which was intended to afford a remedy in such cases, and also to avoid the delay and expense of commencing another action.

The court accordingly hold that the only permissible construction of the proviso is that it authorizes the personal representative of the deceased, when the facts warrant it, to be substituted as plaintiff in the original action brought by the deceased, and to convert it by an amendment of the pleadings into an action under section 5913, as it stood before the proviso was added, for the benefit of the widow and next of kin. It does not authorize such substitution for the purpose of prosecuting the original cause of action which accrued to the deceased in his lifetime. See *Webber v. St. Paul City Ry. Co.*, 97 Fed. 140, 38 U. S. App. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

will be part of him. These are questions to be decided by the trial court if the administrator be permitted to comply as we have suggested.

It is therefore ordered that the order of the court be affirmed on both appeals, and the case remanded to the trial court for further proceedings in accordance with the suggestions of this court.

In the liability of employers generally to their employees for injuries to persons etc. By. Co. v. D. St. Ry. 384 390; on their liability for injuries resulting from defective machinery and appliances, see the monograph on *Employer's Liability*, 38 Am. St. Rep. 289-325; and on the duty of an employer to repair defective machinery, *Griffin v. Gulf etc. Ry. Co. v. Brestford*, 23 Am. St. Rep. 331. For recent authorities on the effect of a promise to repair machinery on the effect of a promise to repair machinery from the charge of contributory negligence of the risk, see *Gulf etc. Ry. Co. v. Garretts*, 37 Am. St. Rep. 333; *Elice v. Eureka Paper Co.*, 174 Am. St. Rep. 365; *Yerkes v. Northern Pac. Ry. Co.*, 37 Am. St. Rep. 361.

NEGAUBAUER v. GREAT NORTHERN RAILROAD

[32 Minn. 184, 99 N. W. 620.]

LIMITATION OF ACTIONS—Conflict of Law. Where a right of action is given which did not exist at the time the statute giving the right also fixes the time when the right may be enforced, the time so fixed becomes a bar to the right, and will control, no matter when the action is brought. (p. 673.)

LIMITATION OF ACTIONS—Conflict of Law. Where a right of action is given which did not exist at the time the statute giving the right also fixes the time when the right may be enforced, the time so fixed becomes a bar to the right, and will control, no matter when the action is brought. (p. 673.)

Yerkes & Stephens and Calhoun & Bennett, v. Negaubauer.

W. R. Begg, for the respondent.

STUART, C. J. This is an appeal by the respondent from the district court of the county of St. Louis, Mo., on a demurrer to the complaint. 185 The facts of the complaint are to the effect that the respondent, Joseph Negaubauer, the mine owner, while in the employ of the defendant,

Montana, killed by the negligence of the defendant; that the law of the state of Montana (Code Civ. Proc. 1895, secs. 4, 578, 579) in force at the time of the death of the plaintiff's son provide that an action to recover damages for the death of one caused by the wrongful act or neglect of another must be commenced within three years; that a father may maintain an action for the death of a minor child, when the death is caused by the wrongful act or neglect of another, and damages may be given as, under all the circumstances, may be just. It appears from the return herein that this action was commenced more than two and less than three years after the death of the minor. The question then to be decided is whether the Montana limitation of three years, or the Minnesota limitation of two years, as provided by section 5913 of the General Statutes of 1894, applies to this action.

The cause of action alleged in the complaint did not exist at common law, which gave no right of action for the death of a person caused by the wrongful act or neglect of another: *See* *Wright v. Minneapolis etc. Ry. Co.*, 32 Minn. 125, 19 N. W. 225. If, then, the plaintiff has or ever had a cause of action for the death of his child by the alleged wrongful act or neglect of the defendant, it is solely by virtue of the statute of Montana, which requires the action to be brought within three years.

Now, it is well settled that where by statute a right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which the right is to be enforced, the time so fixed becomes a limitation or control upon the right, and will control, no matter in what forum the action is brought: 8 Am. & Eng. Ency. of Law, 2d ed., 875; *See* *Section on Limitation of Actions*, secs. 9, 194; *The Harrisburg, Pa. Ry. Co. v. Pott*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, 30 L. ed. 358; *Theroux v. Great Northern Pac. R. Co.*, 64 Fed. 84, 12 C. C. A. 52; *Rodman v. Chicago & North Western Ry. Co.*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704. The counsel for the defendant concede the correctness of the rule, but urge that the statute of Montana giving a father a right of action for the death of his minor child does not itself fix the time within which the action must be brought; hence the rule does not apply to this case. It is true that the limitation upon the right of action is not embraced in ¹⁸⁹⁵ the same section that gives the right, but the section giving the right of action and the section imposing the limitation are a part of the same statute, which is entitled "An act to establish a Code of Civil Procedure," approved February 14, 1895: *Sanders* v.

Montana Codes and Statutes of 1895, secs. 510, 511. The provision giving the right of action and the limitation being parts of the same act, are to be construed together as if they had been placed in the same section. The right is created and the limitation imposed at the same time. In principle, it can make no difference whether the limitation is in the form of a proviso to the section giving the right of action, as was the statute of Montana when the case was decided, or in a separate section of the same statute.

Again, the provision of section 5913 of the Montana Code of 1894, limiting the time for bringing the action to two years, can have no application, in any event, to an action alleged in the complaint, which originated in this state. Or, in other words, section 5913 applies to an action originating in this state. We hold, therefore, that the limitation fixed by the statute of Montana applies to an action alleged in the complaint.

The defendant, however, further urges that this state will not, as a matter of comity, enforce a limitation given by the statutes of another state, unless this state give a similar right of action; that the statute of this state limits the right of action for the death of a person by the wrongful act or neglect of another to two years; and that it is the public policy of this state; and that its courts will not enforce this policy against parties claiming a right of action under the statute of a sister state. The statutes of the sister state are not so dissimilar as to justify the courts of this state in refusing to permit the action on the Montana statute to be maintained in this state if brought at any time within the time limitation: *Herrick v. Minneapolis etc. Ry. Co.*, 31 Minn. 31, 23 Am. Rep. 771, 16 N. W. 413; *Nicholas v. Burlington & Northern Pac. Co.*, 78 Minn. 43, 80 N. W. 776.

It follows that this action is not barred by any statute of limitations, that the complaint states a cause of action, and that the order sustaining the demurrer thereto must be reversed.

*If the Statute of Limitations is regarded as going to the limitation of the remedy, without affecting the right, then the statute does not ordinarily govern. Hence an action, though not barred by the statute where it arose, may be barred by the law where it is sued; and, on the other hand, though barred by the statute where it arose, may not be barred by the law where it is sued. See the monographic notes to *Menzel v. Hinton*, 91 Ill. 211, 21; *Eingartner v. Illinois Steel Co.*, 59 Am. St. 101.*

L. REALTY COMPANY v. JOHNSON.

[92 Minn. 363, 100 N. W. 94.]

HIGHWAYS.—An Easement in a Public street or highway is public and common right to use the same for the passage of personal property, and purposes incidental thereto. (p. 678.)

WILD GAME.—Land Owner's Rights Respecting.—The owner has the exclusive privilege of hunting, and the unqualified right of controlling and protecting the wild game thereon. (p. 678.)

HIGHWAYS.—Rights Respecting Wild Game Therein.—In granting an easement across his land for a highway, the owner does not surrender his right to foster and protect wild game thereon, and the public acquires no right to kill or molest such game while temporarily passing to and fro across the highway. (pp. 678,

Muel Whaley, for the appellant.

L. Lamprey, for the respondent.

LEWIS, J. This action was brought to enjoin appellant from shooting wild fowl in their passage over and across the highway on respondent's premises, and the sufficiency of the complaint is called into question by demurrer.

In the case of *Lamprey v. Danz*, 86 Minn. 317, 90 N. W. 364, the then owner of the premises now under consideration denied the killing and pursuit of birds upon the waters and outside of the highway, and a full description of the premises, improvements, character of the waters and duck passes, was to be found in that decision. It was there held that none of the lakes or waters had ever been meandered or surveyed, and that all constituted strictly private property. In the case now under consideration it appears from the complaint that the wild game passed from one body of water to another upon the premises, and quail ³⁶⁴ frequently went over the highway, where it was the custom of appellant to go and shoot at and kill such game while in their course of transit. The demurrer admits that the adjoining premises are private, belonging to respondent, and that the fowl in question had their natural home thereon during the season. The only inquiry is, In what respect is the right of possession and control by respondent over the game on its premises changed by the fact that the public has acquired a right of passage across its land? Did respondent, in granting the easement to the public, part with any rights and privileges concerning the game in question, belonging to it as the owner? Upon the other hand, did the public

acquire any rights by virtue of the easement, especially connected with, and incidental to, the right

The law is well settled in this state that an public street or highway is the public and common the same for the passage of persons and proposes incidental thereto: *Newell v. Minneapolis*, 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; *v. Lord*, 40 Minn. 337, 42 N. W. 389, in which is the dedication of a highway by the land owner easement for public use as a highway, and the the right to use the land for any lawful purpose with the full enjoyment of the public easement public use and private right must stand together cannot be disregarded by the public authorities respected in so far as may be compatible with the to have a safe, unobstructed and convenient right regard must be had to the nature and situation erty and the circumstances of the case. In *Cater* *ern Tel. Exch. Co.*, 60 Minn. 539, 51 Am. St. N. W. 111, 28 L. R. A. 310, the court traces the development of highways for public uses, and, in the placing of telephone poles along the highway pose an additional servitude, based its decision principle that such use of the telephone was for the public, providing a new way of communication land owner must anticipate the natural development requirements of the public in that respect.

But we may safely assume that the killing of ing to the adjacent premises, and found temporary way, is in no manner connected with or incidental right of passage and transportation. While true to all wild game is in ³⁶⁵ the state, and the o ises whereon it is located has only a qualified est therein, yet he has the right to exercise exclusive dominion over his property, and incidentally right to control and protect the wild game *Lamprey v. Danz*, 86 Minn. 317, 90 N. W. 578, rule on this subject was stated as follows: "Every exclusive dominion over the soil which he absolute such an owner of land has the exclusive right o thing on his land, and the waters covering it." It necessarily follows that, in dedicating the highway to the public, respondent reserved to itself a

eges and rights pertaining to the premises, which included right to foster and protect, for its own use, the wild game on, and that such right and privilege were in no manner rendered to the public in granting the easement. It also follows that the public, including appellant, in accepting the easement thus granted, acquired no right to kill or molest the game while it was passing to and fro across the highway. The court affirmed.

When a Highway is laid out over private property, the public only acquires only an easement of passage, with the rights incident thereto, while the owner of the land retains the fee to the land for all purposes not incompatible with the enjoyment of the easement secured by the public: See the monographic note to Wright v. Stinson, 101 Am. St. Rep. 102-118.

The Owner of Land has the Exclusive Right of Hunting thereon: See Jackson v. Jackson, 69 Mich. 488, 13 Am. St. Rep. 405. And this right may be protected, in a proper case, by injunction: See the monographic note to Moore v. Halliday, 99 Am. St. Rep. 751, on injunctions against trespass on real property.

KEITH v. MELLENTHIN.

[92 Minn. 527, 100 N. W. 866.]

DOWER After Divorce—Partition by Wife—Husband's Creditors.—Where a man conveys land by a deed in which his wife does not join, and thereafter a judgment exceeding in amount the one-half value of the land is recovered against him, she becomes, upon subsequent divorce for his adultery, the owner in fee and entitled to the possession of an undivided one-third of the land, under the statutes of Minnesota, subject in its just proportion with other real estate to the payment of such debts as cannot be paid from his personal estate, and entitled to partition; and in her action for partition, his creditors cannot enforce their right to subject her interest to its proportion of their claims. (pp. 680, 681.)

J. B. Seward and Somerville & Olsen, for the appellants.

I. E. Mathews and A. R. Pfau, for the respondent.

MR. JUSTICE START, C. J. Actions for partition of real estate in Lyon county of Lyon, this state. They were heard as one case, and the facts in each, as found by the trial court, are substantially the following: On June 11, 1891, Wesley Keith was the owner of the lands involved herein. He was then a married

man, and the plaintiff was his wife. On that day to convey the lands by warranty deed to Lewis Keith; but the plaintiff did not join in such deed thereto. On July 12, 1892, Lewis Keith recovered a judgment for the sum of nine thousand seven hundred and forty-five dollars and eighty-two cents in the district court of the county of Lyon against Wesley Keith, which was not satisfied. Thereafter, and on January 31, 1893, the same court was duly granted a decree of divorce from the plaintiff on the ground of his adultery. At this time the plaintiff had no real or personal property, but he was then indebted to Lewis Keith on his judgment to the full amount thereof. Lewis and Luther Keith conveyed the lands in question to the defendants, respectively, by warranty deed. The value of the lands at the time of the divorce was seven thousand and five hundred and twenty dollars, and twenty-one thousand and five hundred dollars at the commencement of these actions. The plaintiff, the husband nor the judgment creditor, Lewis Keith, did not appear to the actions. The trial court found as a conclusion of law that the plaintiff was the owner in fee of an undivided one-third of the lands, that the defendants were the owners of the other undivided two-thirds thereof, and that judgment for a partition be entered. The defendants severally appealed from the judgments.

529 There is no controversy as to the effect of the Statutes of 1894 on the contingent interest of the wife in the lands conveyed by the sole deed of her husband. Section 4808 of the Statutes of 1894 provides that, "When a divorce is obtained on the cause of adultery committed by the husband, the wife shall be entitled to her dower in his lands, in the same manner as if he was dead."

If the husband in this case had died, instead of being divorced on adultery, the plaintiff, by virtue of section 4471 of the Statutes of 1894, would have been entitled to an undivided one-third in fee of the lands in question, "subject in all respects to the portion with the other real estate, to the payment of the debts of the deceased as are not paid from the personal estate."

Therefore, when the divorce was granted for adultery, the plaintiff's contingent interest in the lands became vested, and she at once, without any other act, became the owner in fee and entitled to the portion of the undivided one-third thereof, subject, in its just proportion, to the other real estate, if any, to the payment of such

ould not be paid from his personal estate, and entitled to
ition thereof as in other cases: *Holmes v. Holmes*, 54 Minn.
56 N. W. 46; *Johnson v. Minnesota Loan etc. Co.*, 75 Minn.
4 Am. St. Rep. 438, 77 N. W. 421.

he defendants, however, claim that, because the judgment
nst the husband amounts to more than the value of her un-
ded one-third of the lands, she has in fact no interest therein,
that, as grantees and successors in interest in the land of
judgment creditor, they are entitled to all his rights and
ties in the land, or, in other words, they are entitled to be
rogated to his rights, and that such rights and equities should
etermined and adjusted in this action. It is neither neces-
nor proper to here determine the rights of the defendants,
against their grantor, the owner of the judgment. Unneces-
y, because, if it be conceded that the defendants stand in
shoes of their grantor, still the decision of the trial court
right; improper, because the necessary parties are not be-
e the court. This conclusion necessarily follows from the
ential character of the right of creditors of a husband, di-
ced for his adultery, to subject the undivided one-third in-
est of his real estate, which by the divorce becomes ⁵³⁰ the
property of the wife, to the payment of their debts; also, from
method of enforcing the right. The statute makes no pro-
vision for the enforcement of the right. Equity affords a
remedy by an action brought for that purpose, to which all in-
terested in the matter must be made parties. It is clear that
the right does not belong exclusively to any one creditor, but
all the husband's creditors pro rata. The value of the land
limited, and the amount of the debts uncertain; hence no
one creditor can maintain an action to subject the land exclu-
sively to the payment of his debts. The action must be an equi-
table one for the benefit of all the creditors, in which the for-
mer wife will have the right to contest the validity of each
creditor's claim; also, the question of the amount and value of
the personal property of the husband and of his other real es-
tate. Creditors may in such an action contest the claims of
each other: *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086,
and 78 Minn. 57, 80 N. W. 843.

The fact that in the case at bar the court found the amount
of the claim of the defendant's grantor, that it had not been
paid, and that the husband had no real or personal property,
is not material; for the plaintiff has the right to contest all
these matters in an appropriate action to which all creditors

are parties, so as to be bound thereby. The defendant is not a preferred creditor. The judgment was not plaintiff, or a legal lien on her contingent interest in for the judgment debtor conveyed his entire estate in before the judgment was docketed. If the plaintiff after such conveyance without having been granted the title of the husband's grantees would be absolute.

The setting off to the plaintiff in severalty of her third of the lands will not prevent or embarrass a behalf of the creditors of her husband to subject the payment of its just proportion of their debts. The wants for obvious reasons ought not to be permitted this action for partition into an action to enforce the creditors to subject the plaintiff's interest in the payment of their debts. Were it otherwise, the parties are not before the court. It follows that the trial conclusion of law is fully justified by its findings of fact.

Judgment affirmed.

The Assignment of Dower, including its assignment alienated by the husband, is discussed in the monograph Sanders v. McMillan, 39 Am. St. Rep. 25-39. The assignment of dower to the payment of the husband's debts is discussed in Security Trust Co., 71 Minn. 61, 70 Am. St. Rep. 311; Motley, 53 Neb. 375, 68 Am. St. Rep. 608.

CASES

IN THE

SUPREME COURT

OF

MONTANA.

BAKER v. BUTTE CITY WATER COMPANY.

[28 Mont. 222, 72 Pac. 617.]

APPELLATE PRACTICE.—The appellate court cannot review the action of the trial court in disregarding a special finding of the jury, when the party complaining does not specifically except thereto, but relies alone upon an exception to the entry of judgment. (p. 615.)

APPELLATE PRACTICE.—Inconsistency Between Special Findings and the general verdict cannot be considered by the appellate court, unless the party claiming such inconsistency has moved the court below for judgment in his favor upon the special finding. (p. 685.)

MINES AND MINING—Location Notice—Evidence.—The legislature has power to provide rules for marking the boundaries of mining claims, and to provide for a record of such location and what the recorded paper must contain, and if such location notice fails to conform to the statute, it is not admissible in evidence. (p. 686.)

Forbis & Evans and T. B. Lee, for the appellant.

J. E. Healy, for the respondent.

233 CLAYBERG, C. This was an action in ejectment. Plaintiff alleged ownership of the premises in question, an illegal ouster therefrom by defendant, and an unlawful withholding of the possession thus acquired. The defendant denied plaintiff's ownership and that the ouster was illegal. It then affirmatively alleged "that at all times mentioned in plaintiff's complaint it was, and now is, the owner of, in possession of, and entitled to the possession of the premises described in plaintiff's complaint." The question of the possession of the premises was not, therefore, an issue in the case. Plaintiff testified without objection that defendant was in possession of the property, and the court instructed the jury as follows: "You

are instructed in this case that the defendant is in possession of the premises in dispute, and it devolves upon the plaintiff to establish by a preponderance of the testimony his right to the possession of said premises by showing a valid local title. If he fails in this respect, your verdict must be for the defendant. At the close of the case the defendant requested special interrogatories to be submitted for findings by the jury, of which that marked "No. 1" was as follows: "Was the defendant, at the time of the commencement of this action, in possession of the ground in controversy?" The court complied with the plaintiff's request in this regard. The record does not disclose whether the plaintiff objected to the submission of this question, or whether a bill of exceptions was prepared and presented by defendant, and settled in his behalf, and whether the record properly contains plaintiff's objections or exceptions. *See* *Bohmer v. Goodkind*, 24 Mont. 90, 60 Pac. 813. So the question can be indulged as to whether plaintiff consented to its submission. It is very clear that the court ought not to have submitted this question to the jury, as it was upon no issue involved in the case. The jury returned a verdict for the plaintiff, and at the same time a general verdict for plaintiff, reciting therein "that the defendant withholds the possession of the same [the premises in dispute] from him." The record, therefore, discloses that the general verdict is inconsistent with this special finding. At the rendition of the verdict, plaintiff's attorney moved the court to enter judgment for plaintiff in accordance with the verdict of the jury, which motion, after a hearing, was sustained by the court. Defendant gave notice of intention to move for a new trial, to be based upon "affidavits to be filed and a statement of the case to be prepared and settled." A bill of exceptions on motion for a new trial and bill of exceptions was submitted. The record does not disclose whether a motion for a new trial was ever made or passed upon by the court, or whether an appeal is taken from the judgment only.

The first error assigned is: "The court erred in sustaining finding No. 1." We cannot consider this alleged error as a following reasons:

1. The record does not disclose either a specific exception to the action of the court in that regard. The exception arose upon the hearing of plaintiff's motion for a new trial on the verdict. The court, in its ruling, stated:

on to adopt findings and for judgment is argued by counsel and by the court sustained, with the exception of finding No. 1, and judgment is ordered entered herein in accordance with said verdict." No objection to this action of the court in regard to the special finding is disclosed by the record. The exception we find which, by any possible construction, could be held ²²⁶ to refer to this action of the court, is stated as follows: "The court ordered judgment entered in favor of plaintiff and against defendant, to which action of the court, and the whole thereof, the defendant then and there duly excepted." In other words, counsel did not specifically object to the action of the court below in disregarding finding No. 1, and did not specifically except thereto, but relied entirely upon an exception to the entry of judgment. We do not think that this exception is sufficient to warrant consideration of the error assigned.

The record does not disclose that the defendant sought in any way or manner to take advantage of the inconsistency of his finding No. 1 with the general verdict by motion for judgment upon such finding, notwithstanding the general verdict. We do not believe that the court was bound, in the absence of any action on the part of defendant indicating any reliance upon his finding, to give the defendant any benefit arising from its existence. How can we say that, if defendant had made a motion for judgment upon this finding, disregarding the general verdict, it would not have been granted? The following authorities hold directly, under statutes almost identical with ours, that in order to have the question of inconsistency between a special finding and general verdict considered or passed upon by the appellate court, the party claiming such inconsistency must move the court below for judgment in his favor upon the special finding: *Tritlipo v. Lacy*, 55 Ind. 287; *Toledo etc. Ry. Co. v. Craft*, 62 Ind. 395; *Bartlett v. Pittsburgh etc. Ry. Co.*, 94 Ind. 281; *Northwestern W. Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Carter v. Missouri etc. Ry. Co.*, 6 Okla. 11, 41 Pac. 356. The rule is stated by the text-writers as follows: "In order to obtain the advantage of special findings, a motion for judgment upon them is necessary": *Thompson on Trials*, sec. 2696. "A motion for judgment on the special findings is necessary, as otherwise the judgment will be entered as a matter of course upon the general verdict. In the absence of such motion in the trial court, no question concerning the right to ²²⁶ such judgment can be raised on appeal": 20 Ency. of Pl. & Pr. 375. We agree with the doctrine here announced.

The next error specified is that "the court erred in the plaintiff's location notice of the Keyno." We examined the notice of location referred to, and the same appears to be regular in every respect, and in accordance with the provisions of the statute of this state. We, therefore, are of opinion that the court correctly admitted it in evidence.

The next error alleged is that "the court erred in excluding the location of defendant's Keyno claim." We have examined the notice of location, and are satisfied that it does not conflict with the statute of the state of Montana, or with the construction of that statute by this court in the case of *Purdum v. Laddin*, 20 Mont. 59 Pac. 153. The question as to the right of the court to provide rules for the marking of the boundaries of mining claims, and providing for a record of such locations, is one which the recorded paper must contain, has so long been a part of the law of this state, and has so many times been approved by the supreme court that it would be useless to enter again into any argument of the questions so decided. We are satisfied, therefore, that the court did not err in excluding the location of defendant's Keyno claim.

All other errors specified in the brief have been examined either in the brief itself or by counsel for the appellant, and no argument before the court.

Finding no error in the record, we advise that the judgment appealed from be affirmed.

Poorman and Callaway, CC., concur.

Per Curiam. For the reasons stated in the foregoing opinion, the judgment appealed from is affirmed.

The Principal Case was carried by writ of error to the court of the United States, and the opinion of the court was there affirmed: *Butte City Water Works v. U. S.* 119, 25 Sup. Ct. Rep. 211. The opinion in affirmance was delivered by Mr. Justice Brewer, and reads:

"This was an action of ejectment brought in the county of Silver Bow county, Montana. The dispute was between the plaintiff and the defendant concerning the location of the same mining ground. The defendant's location was adjudged invalid by the trial court, and its decision was affirmed by the supreme court of the state, on the ground of a failure to comply with certain Montana statutes: *Baker v. Butte City Water Works*, 20 Mont. 222, ante, p. 683, 72 Pac. 617. These statutes contain provisions concerning the location of mining claims in addition to those prescribed by congressional legislation, and the question is whether or not compliance with these additional requirements, in addition to those prescribed by the United States laws, is necessary to the validity of a location under the laws of Montana."

tion 2319 of the Revised Statutes (U. S. Comp. Stats. 1901, p. 1425) provides that 'all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands so discovered, which they are found to occupy, are hereby declared to be open to occupation and purchase, by citizens of the United States and those who have declared their intention to do so, under such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, as the same are applicable, and not inconsistent with the laws of the United States.'

Section 2322 (U. S. Comp. Stats. 1901, p. 1425) gives to the locator an exclusive right of possession and enjoyment of all the surface within the lines of their locations 'so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title.'

Section 2324 contains this grant of authority:

Sec. 2324 (U. S. Comp. Stats. 1901, p. 1426). The miners of a mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of holding, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be correctly marked on the ground so that its boundaries can be readily ascertained. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.'

Section 2332 (U. S. Comp. Stats. 1901, p. 1433) makes the statute applicable to mining claims of a state applicable for certain purposes to mining claims under the government.

Section 2338 (U. S. Comp. Stats. 1901, p. 1436) reads as follows: 'As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any state or territory may provide for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.'

'Section 2339 (U. S. Comp. Stats. 1901, p. 1437) contains this clause: 'Whenever, by priority of possession, rights to the use of land for mining, agricultural, manufacturing, or other purposes, have been acquired and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.'

'In 1893 Congress passed an act (28 Stats. at Large, 6, c. 12) relieving from the necessity of the annual labor for that year, 'so long as no mining claim which has been regularly located and recorded

as required by the local laws and mining regulations to forfeiture for nonperformance of the annual assessment for the year 1893," and a similar statute was enacted in 1893 for the annual labor for that year: 28 Stats. at Large, 11.

"While, in the above sections, there is not that authority to the state to legislate respecting location miners to make regulations, yet there is a clear record of legislation. All these statutory provisions, except the provisions referred to, were embodied in the legislation of the state in force ever since.

"Acting upon the belief that they were fully authorized, all, if not all, the states in the mining regions have been prescribing additional regulations in respect to the location of claims, some having been in force for more than a century.

"This court has, in many cases, recognized the validity of state legislation. In *Belk v. Meagher*, 104 U. S. 279, 735, 737, Chief Justice Waite, speaking for the court, said: 'Location is not made by taking possession alone, but by recording the ground, recording, and doing whatever else is required by the acts of Congress and the local laws of the state.'

"In *Erhardt v. Board*, 113 U. S. 527, 5 Sup. Ct. Rep. 1113, it appeared that there were no mining regulations in the district, and it was said by Mr. Justice Brandeis (p. 536, Sup. Ct. Rep., p. 564, L. ed., p. 1116): 'We are bound entirely to the laws of the United States and the laws of the state on the subject. And the laws of the United States do not require at any time in which the excavations necessary to enable the locator to prepare and record a certificate shall be made. The legislation of the state, which, as we have stated, requires that the excavations upon the vein from the day of the filing of the location shall be completed within thirty and thirty days afterward for the preparation of the certificate and its filing it for record. In the judgment of the legislature this was reasonable time.'

"*Kendall v. San Juan Silver Min. Co.*, 144 U. S. 61, 36 Sup. Ct. Rep. 779, 36 L. ed. 583, turned on the question of conflict between the locator with a regulation prescribed by the statutes of the state concerning the record of locations, and the decision was rendered the attempted location invalid. In *Co. v. Rutter*, 177 U. S. 505, 20 Sup. Ct. Rep. 726, 44 L. ed. 1001, it was held that a suit brought in support of an adverse claim was not one of which a federal court necessarily had jurisdiction, as said (p. 508, Sup. Ct. Rep., p. 727, L. ed., p. 800): 'The right of possession may not involve any question of constitution or laws of the United States, but simply of local rules and customs, or state statutes, or even of fact.' Other cases containing similar records are cited.

"The validity of such state legislation has been affirmed by the supreme courts of several states. See, in addition to the present case, *Wolfley v. Lebanon Min. Co.*, 4 Colo. 112; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302; *Metcalf v. Prescott*, 10 Mont. 283, 293, 25 Pac. 1037; *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153; *Sisson v. Sommers*, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829; *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Northmore v. Simmons*, 38 C. C. A. 211, 97 Fed. 386.

"In 1 Lindley on Mines, second edition, section 249, the author says: 'State statutes in reference to mining rights upon the public domain must, therefore, be construed in subordination to the laws of Congress, as they are more in the nature of regulations under these laws than independent legislation.'

"'State and territorial legislation, therefore, must be entirely consistent with the federal laws, otherwise it is of no effect. The right to supplement federal legislation, conceded to the state, may not be arbitrarily exercised; nor has the state the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws. On the other hand, the state may not, by its legislation, dispense with the performance of the conditions imposed by the national law, nor relieve the locator from the obligation of performing, in good faith, those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location. Within these limits the state may legislate.'

"'What is the ground upon which the validity of these supplementary regulations prescribed by a state is challenged? It is insisted that the disposal of the public lands is an act of legislative power, and that it is not within the competency of a legislature to delegate to another body the exercise of its power; that Congress alone has the right to dispose of the public lands, and cannot transfer its authority to any state legislature or other body. The authority of Congress over the public lands is granted by section 3, article 4, of the constitution, which provides that 'the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' In other words, Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of. The nation is an owner, and has made Congress the principal agent to dispose of its property. Is it inconceivable that Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, believe that those interests will be subserved if minor and subordinate regulations are intrusted to the inhabitants of the mining district or state in which the particular lands are situated? While the disposition of these lands is provided for by congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in

the highest sense of the term, and, as an owner may delegate to his principal agent the right to employ subordinates, giving him limited discretion, so it would seem that Congress might entrust to the local legislature the determination of matters respecting the disposal of these lands.

"Further, section 2324 distinctly grants to the miners of each mining district the power to make regulations, and the validity of such grant has been expressly affirmed by this court. In *Jackson*, 119 U. S. 441, 3 Sup. Ct. Rep. 301, 27 L. ed. 990, the court said: 'The act of Congress of 1866 gave the sanction of law to the action of miners, so far as they were not in conflict with the laws of the United States: 14 Stat. at Large, 251, c. 262, sec. 1. The act of 1872 specified with greater particularity the mode of location and appropriation and extent of each mining claim, recorded in the public office, and prescribed the essential features of the rules framed by miners for their own guidance, that which required work on the claim for its maintenance as a condition of its continued ownership.' See, also, *Board of Commissioners*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28 L. ed. 1116, 117 (1884), 335 U. S. 564, 11 L. ed. 1116 (1911). And although since 1866 Congress has, to some extent, modified the subject, prescribing the limits of location and appropriation, and the extent of mining ground which one may thus acquire, it has still permitted, in their respective districts, to make regulations not in conflict with the laws of the United States, and the state or territory in which the districts are situated, the mode of location, manner of recording, and amount of work necessary to maintain possession of a claim.'

"Now, if Congress has power to delegate to a local legislature the making of additional regulations respecting location, it may be doubted that it has equal power to delegate similar power to a state legislature.

"Finally, it must be observed that this legislation has been sustained by Congress more than thirty years ago. It has been applied and valid through all the mining regions of the country. People have been built up on the faith of it. To now strike it down would unsettle countless titles and work manifold injury to the mining interests of the Far West. While, of course, the court may not determine a decision, yet, in a doubtful case, it may well pause before thereby it unsettles interests so vast—interests which have been built up on the faith of congressional action, but also of judicial decisions of the courts sustaining it, and of a frequent recognition of its validity by this court. Whatever doubts might exist if this question were wholly *res integra*, we have no hesitation in holding that it is now to be considered as settled by prior adjudication."

"The Montana statute (Mont. Codes Annotated, sec. 3612), among other supplementary regulations, provided that the declaratory statement filed in the office of the clerk of the county in which the lode or claim is situated must contain 'the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims,' and 'the location and description of each corner, with the markings thereon.' A failure to comply with these regulations was the ground upon which the supreme court of Montana held the location invalid. It is contended that these provisions are too stringent, and conflict with the liberal purpose manifested by Congress in its legislation respecting mining claims. We do not think that they are open to this objection. They certainly do not conflict with the letter of any congressional statute; on the contrary, are rather suggested by section 2324. It may well be that the state legislature, in its desire to guard against false testimony in respect to a location, deemed it important that full particulars in respect to the discovery shaft and the corner posts should be, at the very beginning, placed of record. Even if there were no danger of false testimony, it was not unreasonable to guard against the resurrection of incomplete locations when, by subsequent explorations, mining claims of great value have been uncovered.

"We see no error in the rulings of the supreme court of Montana, and its judgment is affirmed."

SMALL v. RAKESTRAW.

[28 Mont. 413, 72 Pac. 746.]

HOMESTEADS—Public Lands.—Residence for voting purposes in another precinct than that in which land is situated precludes an entryman from claiming residence at the same time on the land for homestead purposes. (p. 693.)

HOMESTEADS on Public Lands—Residence.—Decision of Land Department as to a homestead entryman's residence on the public lands claimed as a homestead, and the bona fides of his settlement thereon, is one of fact, and conclusive upon the courts, in the absence of fraud or imposition. (p. 694.)

PUBLIC LANDS—Decisions of Land Department—Errors of Law.—If the officers of the public land department err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions. (pp. 694, 695.)

PUBLIC LANDS—Decisions of Land Department—Errors of Fact.—For mere errors of judgment upon the weight of evidence, or upon mere questions of fact, by officers of the Land Department in a contested case before them, the only remedy is by an appeal from

one officer to another of the Land Department. In decision is binding and conclusive upon the courts.

PUBLIC LANDS—Patents—Trustee—Evidence. holder of the legal title to public land under a patent of another, and to compel him to transfer the title must show that he, himself, and not the holder, is patent, and that, in consequence of erroneous ruling of the Department upon the law applicable to the facts he has been refused him. (p. 695.)

Foot & Pomeroy, for the appellants.

416 CALLAWAY, C. On demurrer to complaint. The substance of the complaint is that in a contest for title between the plaintiff here, Walter W. Small, and the defendant here, Samuel O. Rakestraw, before the Land Department, the Secretary of the Interior erroneously decided in favor of Rakestraw, and that, had it not been for the wrongful decision of the defendant, and the erroneous ruling of the Secretary for the land would have issued to plaintiff. The substance of the complaint is that the defendant shall be decreed to transfer title to the land in trust for the plaintiff, and costs. To this complaint the defendant interposed a demurrer, stating that "the court has no jurisdiction of the cause, and the matter thereof," and that the complaint does not contain facts sufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff refusing to amend, judgment was entered for defendant for costs. From this judgment the plaintiff appeals.

Plaintiff alleges that he settled upon the land in question during the latter part of the year 1886, and remained there **417** continuously until after he submitted final proof of his homestead claim to the Land Department. The land was then subject to entry on August 16, 1891, under the act of the United States, and on the day following the plaintiff entered the same under the homestead law, and on January 1, 1892, made final proof in furtherance of such entry. Meanwhile Rakestraw filed an affidavit of contest against plaintiff's entry, charging that Small had failed to comply with the United States law as to residence. The hearing was held before the register and receiver of the local land office, and judgment was rendered in favor of Rakestraw. Small thereupon appealed to the Secretary of the general land office, who found in favor of the plaintiff, and the contest dismissed. Rakestraw then appealed to the Secretary of the Interior, who reversed the decision of the general land office, and ordered Small's homestead entry

his opinion, the Secretary said: "Plaintiff filed his affidavit of contest against the defendant's homestead entry, charging that the entryman had failed to comply with the law as to residence. The testimony of Small himself is that he never resided in the precinct in which his homestead entry lies, but did reside at other points, a long distance from his homestead, at least during the time he claims he was seeking to maintain residence upon the land. He runs a carpenter-shop in town, and to use his own words, 'determined to return to the ranch soon enough to keep a good showing of habitation.' His reason for that was that the plaintiff threatened him with violence if he undertook to stay on the land. Without passing upon any other question, it is enough to say that a residence for voting purposes in another precinct from the land precludes an entryman from claiming residence at the same time on the land for homestead purposes: *George v. Barnes*, 4 L. D. 62; *Small v. McHugh*, 17 L. D. 176; *Edwards v. Ford and O'Connor*, decided June 18, 1894."

Plaintiff contends that, in saying "a residence for voting purposes in another precinct from the land precludes the entryman from claiming residence at the same time on the land for homestead purposes," the Secretary committed such "a gross mistake and misapplication and misconstruction of the law" as to take this case within the rule that whenever it is made to appear to a court of equity that the officers of the Land Department have issued a patent to the wrong person by reason of a mistaken application of the law to the facts in the case, the court may, in a proper proceeding, interfere, and control the determination of the department so as to secure the just rights of the parties injuriously affected. In coming to his determination as to the plaintiff's residence upon the land, and the bona fides of his settlement thereon, the Secretary passed upon questions of fact, whereof he was the exclusive judge, in the absence of fraud or imposition, and neither is shown in this case.

Plaintiff says that the Secretary was in error in drawing a conclusive presumption of abandonment from the fact that plaintiff voted in Granite and Bonner, precincts other than the one in which his homestead claim was. Granite is in another county. No other evidence touching the question of plaintiff's residence for voting purposes may have been before the Secretary, and we do not know, as it does not appear from the complaint that the only facts before him on that subject were those relating to plaintiff's voting at Granite and Bonner. The question of re-

dence is one of fact: *McHarry v. Stewart* (Cal.), 35 Pac. 141; *Stewart v. McHarry*, 159 U. S. 643, 16 Sup. Ct. Rep. 117, 40 L. ed. 290. From the facts before him the Secretary decided that the plaintiff had not resided upon his homestead continuously for the five years prior to January 26, 1892. On the contrary, he found that the plaintiff had established a residence elsewhere for voting purposes during that time. And we think the Secretary's statement that "a residence for voting purposes in another precinct from the land precludes an entryman from claiming residence at the same time on the land for homestead purposes" is correct. Whether the Secretary erred in his finding upon the facts submitted to him is immaterial in this inquiry. It makes no difference what our conclusion on the subject might ⁴¹⁹ be: *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782, 29 L. ed. 61. "The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties, founded upon their decisions; but for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department": *Shepley v. Cowan*, 91 U. S. 340, 23 L. ed. 424, quoted in *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848. In *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. Rep. 249, 29 L. ed. 570, Mr. Justice Field, speaking for the court, said: "Without going into any detail of the evidence presented to the commissioner and the Secretary of the Interior, but taking the general statement of its nature, which we have given, it is clear that their attention was drawn by it to the character of the settlement of Johnson, and that they considered whether his entry was made to acquire a home for himself or for his son in law, whether his residence had been sufficiently personal and continuous to save and perfect any right, if in fact he had ever any, and whether or not he had abandoned the land. The findings of the Secretary upon any of these matters must be conclusive, in the absence of any fraud and impossibilities we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the findings of the department upon matters of fact cognizable by it

en expressly affirmed: *Johnson v. Towsley*, 13 Wall. 72, ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 340, 23 L. ed. Moore v. Robbins, 96 U. S. 530, 535, 24 L. ed. 848; *Quinby v. Conlan*, 104 U. S. 420, 426, 26 L. ed. 800; *Smelting Co. v. Conlan*, 104 U. S. 636, 640, 26 L. ed. 875; *Steel v. Smelting Co.*, 106 U. S. 447, 450, 27 L. ed. 226." And see *Murray v. Monmouth etc. Co.*, 25 Mont. 14, 63 Pac. 719; *Sanford v. Sanford*, 39 U. S. 642, 11 Sup. Ct. Rep. 666, 35 L. ed. 290. "It lead to endless litigation and be fruitful of evil if a superpower were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact stated for their consideration": *Quinby v. Conlan*, 104 U. S. 426 L. ed. 800. The following language in *Moore v. Northpac. R. R. Co.*, 18 Mont. 290, 45 Pac. 215, is applicable to the case: "Counsel for appellant contends that decisions of the Secretary of the Interior, made solely on the construction of the law may be attacked in this proceeding; but it nowhere appears that the land contest between plaintiff and defendant was determined by the Secretary of the Interior upon a construction of the law only. As far as the record shows, the Secretary passed upon the facts, and we cannot say that his decision was arrived at from a construction of the law only. Decisions are generally based upon a consideration of both law and facts": See *Power v. La.*, 24 Mont. 243, 61 Pac. 468.

The plaintiff contends, however, that a settlement cannot be made upon public lands already occupied, and therefore the defendant had no right to obtain the patent, for the reason that he initiated his claim to the land in controversy by trespass against the plaintiff. In answer to this contention, we quote the following from the opinion of the court in *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782, 29 L. ed. 61: "To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that, in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patent. It must appear that by the law, ⁴²¹ properly administered, the title should have been awarded to the claimant: *Smelting Co. v. Kemp*, 104 U. S. 636, 647, 26 L. ed. 875; *Boggs v. M. & N. Min. Co.*, 14 Cal. 279, 363. It is therefore immaterial

the decision of this case what our judgment may be upon the conclusions of those officers as to the possession of the patentee."

We are of the opinion that the complaint does not state facts sufficient to invoke the action of a court of equity, and therefore the judgment should be affirmed.

Clayberg, C., and Poorman, C., concur.

Per Curiam. For the reasons given in the foregoing opinion, the judgment is affirmed.

The Principal Case after being carried by writ of error to the supreme court of the United States was there affirmed (*Small v. Rakestraw*, 196 U. S. 403, 25 Sup. Ct. Rep. 285), in the following opinion written by Mr. Justice Holmes:

"This is a complaint by the plaintiff in error to charge the defendant with a trust in respect of land which the latter holds under a patent from the United States. It alleges a homestead entry by the plaintiff, a contest by the defendant, a decision for the defendant by the local register and receiver, a reversal of this by the commissioner of the land office, and a reversal of the latter decision and a cancellation of the plaintiff's entry by the Secretary of the Interior. The last order is set forth in full, and the complaint goes on the ground that this order discloses a mistake of law on its face. The complaint was demurred to, the demurrer was sustained, and the suit dismissed. An appeal was taken to the supreme court of the state, which affirmed the judgment: *Small v. Rakestraw*, 28 Mont. 413, 72 Pac. 746. The case then was brought here.

"The material portion of the Secretary's decision is as follows:

"January 21, 1892, plaintiff filed his affidavit of contest against the defendant's homestead entry, charging that the entryman had failed to comply with the law as to residence. The testimony of Small, himself, is that he never voted in the precinct in which his homestead entry lies, but did vote at other points a long distance from his homestead at least twice during the time he claims he was seeking to maintain residence upon the land. He runs a carpenter-shop in town, and, to use his own words, "determined to return to the ranch only often enough to keep a good showing of habitation." His excuse for that was that the plaintiff threatened him with violence if he undertook to stay on the land.

"Without passing upon any other question it is enough to say residence for voting purposes in another precinct from the place of an entryman from claiming residence at the same land for homestead purposes: *In re Burns*, 4 L. D. 62; *Hugh*, 17 L. D. 176; *Edwards v. Ford* (decided June 18, D. 546."

plaintiff's case rests on the assumption that the words 'passing upon any other question,' mean without passing any other question than an absolute proposition of law, and the proposition is that a vote in another precinct is fatal to a residence. But the Secretary found, by implication, that the plaintiff not merely voted elsewhere, but resided elsewhere for the purpose of voting. It was after this finding that he laid down the rule complained of. The case presents no exceptional circumstances which warrant our going behind the finding of fact: *Bohall v. Dilla*, 155 U. S. 47, 5 Sup. Ct. Rep. 782, 29 L. ed. 61; *Leo v. Johnson*, 116 U. S. 51, 6 Sup. Ct. Rep. 249, 29 L. ed. 570, 571; *Stewart v. McMillan*, 159 U. S. 643, 650, 16 Sup. Ct. Rep. 117, 40 L. ed. 290, 292. The plaintiff admits that, on one occasion after his entry, he voted in another county other than that in which the land lies, so that it appears from the complaint that there was some evidence that his residence at the time of voting was not in the latter county, and, as the supreme court in *Montana* remarks, it does not appear clearly that all the facts relied upon by the Secretary are those set forth. It is true that a vote in another county is only a circumstance to be considered, but when it is taken into the conclusion of a voting residence elsewhere, it leads to the exclusion of a residence elsewhere for all purposes by the very provisions of the Compiled Statutes of Montana on which the plaintiff relies. *Mont. Comp. Stats.*, secs. 1007, 1020.

In view of what we have said it does not appear as matter of course that the Secretary's finding of voting residence was wrong, and it does not appear that his proposition, taken as a proposition of law, was wrong. But, further, the words, 'without passing on any other question' cannot be taken absolutely to limit the ground of the plaintiff's proposition to the proposition of law. It hardly goes further than to emphasize one aspect of the facts as dominant in the Secretary's finding. He already had adopted the plaintiff's own words as establishing that the plaintiff's purpose was only to keep up a good show. This goes to the general conclusion which the Secretary drew, and shows that it was a conclusion, not from the plaintiff's voting residence merely, but from other facts. Judgment affirmed."

CITY OF BUTTE v. PALTROVICH.

[30 Mont. 18, 75 Pac. 521.]

CONSTITUTIONAL LAW—Ordinance Regulating Pawnshops.—An ordinance making it unlawful to keep open a pawnshop after 6 o'clock in the evening does not amount to a prohibition of the business, and is a constitutional regulation thereof. (p. 700.)

CONSTITUTIONAL LAW—Ordinances Regulating Business.—The fact that ordinances or police regulations operate as an interference with the free exercise of the classes of business made subject to them cannot alone be made the test of their validity. If they afford reasonable facilities for the conduct of the business, they do not amount to a prohibition, but only to a regulation thereof. (p. 700.)

LICENSES Taken to Carry on Certain Business within a city.—are taken with notice that the city may impose any reasonable regulation for the conduct of such business which may be necessary to peace and good order. (p. 700.)

CONSTITUTIONAL LAW—Ordinance Regulating Pawnshops.—An ordinance does not deny the equal protection of the law, simply because it regulates the hours of operating and keeping open pawnshops, loan offices, and second-hand stores only, if it applies alike to all engaged in that class of business. (p. 700.)

CONSTITUTIONAL LAW—Regulation of Business.—It is only when persons engaged in the same business are subjected to different restrictions, or are granted different privileges under like conditions that the discrimination is open to objection, or can be said to impair the equal right and protection which all may claim under the law. (p. 701.)

POLICE POWER—Regulation of Business.—In the exercise of the police power citizens may, for the public good, be constrained in their conduct and business, with reference to matters in themselves lawful and right. (p. 701.)

MUNICIPAL ORDINANCE Regulating Business—Reasonableness—Presumption.—The question of the reasonableness of an ordinance regulating a certain business is one of fact of which the body enacting it is the best judge, and in the absence of a clear showing to the contrary, its reasonableness must be presumed. (p. 702.)

J. L. Wines, for the appellant.

E. M. Lamb, H. A. Bolinger and J. L. Templeman, for the respondent.

²⁰ **HOLLOWAY, J.** The appellant Victor Paltrovich, was convicted in the police magistrate's court of the city of Butte of violating ordinance No. 586 of that city. He appealed to the district court, where the cause was tried on an agreed statement of facts. The facts agreed upon are that ordinance No. 586 was duly passed by the city council, approved by the mayor, and published and recorded as required by law; that defend-

t Paltrovich was a pawnbroker engaged in that business in the city of Butte; that he kept his place of business open and transacted such business after 6 o'clock P. M. on January 7, 1902 (January 7, 1902, not being a day next preceding a holiday); that the defendant had a license to conduct such business from the city of Butte, and a like license from the authorities of Silver Bow county; that the city of Butte has not required any trades or avocations mentioned in subdivision 16 of section 4800 of the Political Code, as amended by act of the fifth legislative assembly approved March 8, 1897 (Sess. Laws 1897, p. 203), to close between 6 o'clock P. M. and 7 P. M. of the next day, except pawnbrokers, loan offices and second-hand stores, but that all other places of business, trades and professions in said city do close at 6 P. M. by consent, without being required to do so by ordinance. Upon this statement of facts, the district court found the defendant guilty, and adjudged that he pay a fine of fifty dollars and costs. From ²¹ this judgment, and an order denying him a new trial, the defendant appeals.

Section 1 of ordinance No. 586 reads as follows: "That hereafter it shall be unlawful for any person, persons, or corporation to keep open or transact business with the public between the hours of 6 o'clock P. M. and 7 o'clock A. M. of the following day and on legal holidays, in the operation of a pawnshop, loan office or second-hand store; provided, however, that on the next day preceding a legal holiday the hour of closing said place of business shall not be later than 10 o'clock P. M." Section 2 provides a penalty for a violation of the ordinance, and section 3 contains a repealing clause.

Both parties have proceeded upon the theory that section 4800, above, as amended, is controlling in this instance, and we shall do likewise, as it is immaterial to the consideration of this case whether in fact it is, or whether the act of the third legislative assembly, approved March 7, 1893 (Sess. Laws 1893, p. 13), is in force. Subdivision 16 of section 4800, above, as amended, reads as follows: "The city or town council has power: 16. To license, tax and regulate auctioneers, peddlers, pawnbrokers, second-hand and junk shops, drivers, porters, saloons, billiard-tables, tenpin alleys, shooting galleries, shows, circuses, street parades, theatrical performances and places of amusements, within the city or town." Under the authority conferred by this section, the city enacted ordinance No. 586.

Appellant contends that the ordinance is invalid for the reason that the city exceeded the authority delegated to it by sub-

division 16 of section 4800 as amended, in the following particulars: 1. The ordinance prohibits the prosecution of his business; 2. It is an unlawful interference with or restraint of trade; and 3. Under this ordinance he is denied the equal protection of the law.

1. Appellant contends that this ordinance prohibits him from conducting his business during a portion of every day, and that, under the power granted to the city to license, tax and regulate such business, it has no power to prohibit it altogether.

²² A regulation presupposes the existence of a right. "To regulate" means to adjust; to govern by rule; to direct or manage according to certain standards or laws; to subject to rules, restrictions or governing principles: Standard Dictionary. But does the ordinance in fact operate as a "prohibition," as that term is used in the adjudicated cases? An examination of the authorities discloses that, where the term "prohibit" is used, it is in the sense of interdict; that is, to stop altogether. Most, if not all, police regulations do in fact operate as an interference with the free exercise of the classes of business made subject to them, but this interference alone cannot be made the test of their validity. If they afford reasonable facilities for the conduct of the business, they do not amount to a prohibition, but to a regulation, thereof: *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; 1 *Dillon on Municipal Corporations*, 4th ed., sec. 400; *Ex parte Byrd*, 84 Ala. 17, 5 Am. St. Rep. 328, 4 South. 397.

2. Appellant also contends that as he had a city and state license to conduct his business, and neither license imposed any limitation on the time within which he might conduct such business, the ordinance in question operates as an unlawful restraint of trade. But appellant's licenses were mere permits to conduct his business, and he took them charged with the knowledge that the city might impose any reasonable regulation for the conduct of that business which might be necessary to the peace and good order of the city: *Smith & Lackey v. Mayor etc. of Knoxville*, 3 Head (Tenn.), 245; *Horr & Bemis on Municipal Police Ordinances*, sec. 132.

3. Appellant makes particular complaint that only pawnbrokers, second-hand stores and loan offices, of all the classes of business enumerated in subdivision 16, *supra*, are made subject to this ordinance, and that he is thus denied the equal protection of the law; but he does not say that any other pawnbroker is kept from the operations of this ordinance. It is only where

persons engaged in the same business are subjected to different restrictions, or are granted different privileges under like conditions, ²³ that the discrimination is open to objection, or can be said to impair the equal right which all may claim under the law: *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28 L. ed. 1145; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923.

The power conferred upon the city of Butte by subdivision 16, above, is primarily to enact such police regulations with reference to the occupations therein enumerated as shall be necessary to the good order and general welfare of its citizens.

The only remaining question is, Is the regulation provided by this ordinance a reasonable one? The mere fact that appellant's business is legitimate, and specifically recognized as such by legislative enactment, does not render ineffectual the power conferred by subdivision 16 above. The police power is not confined to the regulation of those classes of business which are essentially illegal, for, if illegal, in the sense that they are prohibited by law, it is not easily understood how they could be regulated at all.

It is of the very essence of the exercise of police powers that citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right: *Hopper v. Stack*, 69 N. J. L. 562, 56 Atl. 1. It is not a material inquiry to attempt to ascertain the reason which impelled the legislature to designate the business of pawnbrokers as subject to police regulations. It is sufficient for us to know that it has done so, and deal with the law as we find it.

The fact that appellant cannot prosecute his business whenever he may desire to do so is hardly a sufficient reason for saying that the restrictions imposed are unreasonable. However comprehensive the terms "individual liberty," so frequently made use of, are, and however broad the claim which may be advanced that everyone may employ his time in a lawful undertaking as may best serve his own interests, still the liberty referred to is a relative term, and, at most, means liberty regulated by just and impartial laws, while all sorts of reasonable restrictions are imposed upon the actions of men for the common ²⁴ welfare and good of society: *State v. Freeman*, 38 N. H. 426.

However, the question of the reasonableness of the regulation is one of fact, of which the city council is the best judge: *Staates v. Borough of Washington*, 44 N. J. L. 605, 43 Am.

Rep. 402; *City of Grand Rapids v. Brandy*, 105 Mich. 670, 55 Am. St. Rep. 472, 64 N. W. 29, 32 L. R. A. 119; and in the absence of a clear showing to the contrary, its reasonableness will be presumed: *Ivins v. Inhabitants of Trenton*, 68 N. J. L. 501, 53 Atl. 202.

The express power to enact an ordinance of this character is conferred by subdivision 16, above, and the legislature thereby indicated that it is safe to trust to the judgment and discretion of the common councils of our cities to determine to what extent the power conferred should be exercised; and there is every presumption to be indulged in this instance that the city council of Butte was actuated by pure motives, and that it was thoroughly familiar with the peculiar surrounding circumstances, with the defects of prior regulations, and with the particular evils to be remedied. In addition to this presumption, it is made to appear from the record that all other places of business close at 6 o'clock P. M., so that, after all, appellant is in no position to say that he is discriminated against in any sense. The ordinance permits him to conduct his business until 10 P. M. on every day next preceding a holiday, and, as more than sixty holidays are provided for by our code (Pol. Code, sec. 10), it is not apparent that the regulation is in any wise unreasonable.

In numerous instances like ordinances have been called in question, where the business affected was the proper subject of police regulation, and sustained as reasonable: *State v. Welch*, 36 Conn. 215; *City of Bowling Green v. Carson*, 10 Bush (Ky.), 64; *State v. Freeman*, 38 N. H. 426; *Staates v. Borough of Washington*, 44 N. J. L. 605, 43 Am. Rep. 402; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28 L. ed. 1145; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923; *Smith & Lackey v. Mayor etc. of Knoxville*, 3 Head (Tenn.), 245; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660; *Maxwell v. Jonesboro*, 11 Heisk. (Tenn.) 257.

²⁵ We are of the opinion that the authority to enact ordinance No. 586 is specifically given by subdivision 16 of section 4800 above, as amended; that it is a police regulation, and, in the absence of clear proof to the contrary, it will be deemed reasonable.

The defendant was properly convicted, and the judgment and order denying his motion for a new trial are affirmed.

On the Power of Municipal Corporations to limit the hours during which certain businesses may be carried on, see Ex parte Byrd, 84 Ala. 17, 5 Am. St. Rep. 328; *Staates v. Washington*, 44 N. J. L.

605, 43 Am. Rep. 402; *Hall v. Carmichael*, 8 Baxt. 211, 35 Am. Rep. 696.

The Business of Pawnbrokers is within the police power of the state and subject to reasonable rules and regulations; and a very clear abuse of this power must be shown in order to justify a court in declaring the regulations unreasonable and void: *Grand Rapids v. Brandy*, 105 Mich. 670, 55 Am. St. Rep. 472; *St. Joseph v. Levin*, 128 Mo. 588, 49 Am. St. Rep. 577.

McCONNELL v. COMBINATION MINING AND MILLING COMPANY.

[30 Mont. 239, 76 Pac. 194.]

CORPORATIONS—Action Against Officers by Minority Stockholders.—A corporation is necessarily made a party to an action against its officers for fraudulent misappropriation of its funds; though the action is brought by the minority stockholders in their names as plaintiffs, it is really brought on behalf of the corporation. (p. 709.)

CORPORATIONS—Action Against Officers.—Demand on the officers of a corporation to bring suit for their fraud in misappropriating its funds is not a condition precedent to the right of action by the minority stockholders. (p. 709.)

CORPORATIONS—Action Against Officers by Minority Stockholders.—Though the allegations in a complaint in an action against the officers of a corporation for their fraudulent misappropriation of its funds are not sufficient to enable the action to be considered as brought on behalf of others than the minority stockholders named as plaintiffs, its sufficiency as an action in their behalf is not impaired by allegations that they bring it for others as well as for themselves. (p. 709.)

EQUITY JURISDICTION.—A court of equity, having obtained jurisdiction for one purpose, may retain that jurisdiction for all purposes of the action necessary to the complete protection of the plaintiff's rights. (p. 710.)

CORPORATIONS—Donations Ultra Vires.—If the statute specifies the purposes for which a corporation may be created, and political purposes do not appear in the enumeration, donations for such purposes are beyond the power of the corporation, and not binding upon minority stockholders who do not sanction by act or acquiescence the making of such expenditures. (p. 714.)

CORPORATIONS—Right to Vote Salary to Director.—In the absence of power emanating from the stockholders from statute, or from by-laws legally adopted, the directors of a corporation have no authority to vote a salary to any of their number. (p. 714.)

CORPORATIONS—Right to Vote Salary to Directors.—A resolution of four directors of a corporation voting three of their number salaries, predicated on by-laws previously passed by the same directors and one other is void. (p. 715.)

CORPORATIONS—Right of Directors to Vote Salary.—Directors in a corporation cannot act on, nor form part of a quorum to act

on, a proposition to vote part of their number salary, increase their compensation, or vote themselves back pay. Their acts in this respect are void. (p. 716.)

CORPORATIONS—Removal of Office from State.—The board of directors of a corporation has no power to remove the principal business office of the corporation, its records and funds, beyond the jurisdiction of the state in which the corporation was created and in which its business is actually transacted. Such acts are *ultra vires* and void as to stockholders not consenting thereto or participating therein. (p. 719.)

CORPORATIONS—Removal of Official Business from State.—Directors of a corporation may transact business outside of the state where the corporation is created, but they have no right to move the entire official business of the corporation beyond the state, and their acts in attempting to hold regular monthly meetings and to sit as the board of directors in another state are *ultra vires* and void. (p. 719.)

CORPORATIONS—Ratification of Unauthorized Acts of Directors—Estoppel.—Stockholders in a corporation who took no part in a meeting of directors and stockholders, and did not vote either in person or by proxy, are not estopped to complain of unauthorized acts of directors, ratified at such meeting. (p. 720.)

CORPORATIONS—Illegal Acts of Directors—Laches in Making Complaint.—If a series of illegal acts by the directors of a corporation are continued over a period of years and until the commencement of a suit against them therefor by the minority stockholders, the latter are not guilty of laches in the delay in bringing the suit. (p. 720.)

EVIDENCE.—Minutes Purporting to be of Corporation Meetings, consisting of separate sheets of paper pinned to the leaves of a record-book, are not sufficiently identified to be admissible in evidence. (pp. 720, 721.)

EVIDENCE—By-laws of Corporation.—If part of the by-laws of a corporation are introduced in evidence over objection, the objecting party has the right to introduce in evidence the remaining part. (p. 721.)

CORPORATIONS—Liability of Officer for Misappropriation of Funds.—If the secretary of a corporation, illegally paid a salary by the directors thereof, is not himself a director and not connected with the act of such directors in fraudulently misappropriating the corporate funds, he cannot be held liable by the minority stockholders, but the directors who caused the money to be paid to him may be required to account therefor. (p. 721.)

E. A. Harwood and E. Scharnikow, for the appellants.

Forbis & Evans, for the respondents.

245 POORMAN, C. The original complaint in this cause was filed September 8, 1898. Subsequently several supplemental complaints and amendments were filed to meet new conditions arising, or to put in issue facts alleged to have been discovered after the commencement of the action. It is alleged that the individuals named as defendants, pretending to act as trustees (directors) of the defendant corporation, wrongfully

abandoned the principal office of the company, at Butte, Montana, and moved the books, records, stock register and papers to St. Louis, Missouri; that they were proceeding to sell the stock of plaintiffs to satisfy assessments wrongfully made; and that they had misappropriated funds and other property of the company, and had been guilty of fraud in connection therewith. The court was asked to enjoin the defendants from selling the stock, to require the return of the records to Butte, and that defendants be required to render an accounting. An injunction was issued, restraining the selling of the stock, and forbidding the defendants to detain longer away from Butte the records of the company. The material allegations of the complaint were put in issue by the defendants.

A referee was appointed by the court to hear the evidence, to make findings of fact and conclusions of law, and report the same to the court. The referee having made his report adverse to the contentions of the plaintiff, judgment of dismissal was entered; and from this judgment, and the order overruling plaintiff's motion for a new trial, this appeal is taken.

²⁴⁶ The defendant company was incorporated under the laws of Montana territory, December 27, 1887, for the purpose of carrying on a general mining and milling business; to locate, acquire, sell, develop, and work mines and mining claims; and to buy, sell and treat ores; these operations to be carried on at Black Pine mining district, Deer Lodge county, and also at Butte City, Silver Bow county; the business of the company to be transacted at both these places, but the principal office to be at Butte City. The capital stock of the company consisted of \$600,000, represented by 300,000 shares of stock, of the par value of two dollars each. Seven directors were to manage the affairs of the company. The mines of the company were operated until July or August, 1893, when they were closed down, and remained closed until June, 1895, when operations were resumed and continued until February, 1897, when the mines were again closed, and have not been operated since that time.

At the annual stockholders' meeting held in Butte City, Montana, June 27, 1892, the defendant directors, together with plaintiffs Williams and Joseph H. Harper, were elected directors for the ensuing year. On July 6, 1892, this new board of directors met, but, no quorum being present, adjourned to meet in St. Louis. Plaintiffs Williams and J. H. Harper were present and supported this action. In the published notice of this stockholders' meeting was contained a statement that at

such meeting the question of removing the office to St. Louis would be submitted, and the following resolution was introduced: "Resolved, that the home office and directory of the Combination Mining and Milling Company be removed from the city of Butte, in the state of Montana, to the city of St. Louis, in the state of Missouri, and that the incoming president and board of trustees (directors) be and the seven are hereby authorized and empowered to perform any needful and lawful acts whatsoever necessary or required for the purpose of such removal." Two hundred and sixty-one thousand four hundred and twenty-nine shares of stock were voted in favor of this ²⁴⁷ resolution, and 1,600 shares against it. Plaintiffs Williams, J. H. Harper and Helen C. Harper supported this resolution. The records of the company from this time until the return of the office to Butte, in October, 1898, appear to be in a somewhat chaotic condition. The treasurer, it appears, kept no record at all. The secretary's record is in part regular in form, and in part consists of fragmentary scraps and separate sheets of paper written in pencil, containing blanks and marginal notations pinned to the leaves of some book, or laid loosely between the leaves. Certain writings purporting to be by-laws of the company were also presented. Some of these records consist of references to resolutions or proceedings by number, without containing the resolutions or proceedings to which they refer. These matters were all offered in evidence, and were, except the loose sheets, admitted, for one purpose or another, over the objections of plaintiffs.

Passing these objections for the time being, and considering these so-called records in connection with the oral testimony in the cause, it appears that Charles D. McClure was president, Paul A. Fusz vice-president, M. Rumsey treasurer, and Jesse B. Mellor secretary of the board of directors; that at the meeting of this board held at St. Louis, December 29, 1892, at which were present defendants Ewing, Fusz, M. Rumsey, L. M. Rumsey and President McClure this proceeding was had: "That this board does hereby approve the following salaries and office rent, as set by the president: Secretary's salary \$1,250 per annum, messenger's salary \$300 per annum, office rent \$200 per annum." That on February 25, 1893, this board held an adjourned meeting at St. Louis, at which were present Vice-president Fusz, L. M. Rumsey, Treasurer M. Rumsey and President McClure, and the following proceeding was had: "Mr. Fusz offered, Mr. L. M. Rumsey seconding, that the president

be paid a salary of \$2,500 per annum; that the vice-president be paid a salary of \$5.00 per day for each day actually served; that the treasurer be paid a salary of \$25 per month, all to date from January 1, 1893. Adopted." It further appears ²⁴⁸ that these defendants, acting as such board of directors, continued to hold meetings at St. Louis, Missouri, until, in obedience to the order of the court, they returned the records to Montana; and at Butte, Montana, October 27, 1898, a directors' meeting was held, at which were present Ewing, Fusz, Rumsey, Williams and one Merrill, who was then a director; absent, McClure and M. Rumsey. At this meeting the minutes of the meeting of November 21, 1891, and July 16, 1892, were also read and approved by all the trustees present, except Williams, who did not vote. The minutes of the various directors' meetings which had theretofore been held in the city of St. Louis were then read and approved by all of the directors present, except Williams, who did not vote. It appears further that during the time the office was maintained at St. Louis the stockholders' meetings were held at Combination, Montana, these defendants, except Mellor, being uniformly re-elected as directors. The defendant Mellor was at no time a director, but was during this period in addition to being the secretary of the board of directors, also the private secretary of defendant McClure.

The expenditures and charges to which specific objections are made are:

President McClure, salary as president.....	\$14,374 78
President McClure, expenses attending stockholders' meeting.....	75 00
President McClure, attorney's fee....	500 00
Vice-president Fusz, salary as acting president....	1,038 15
Vice-president Fusz, attorney's fee.....	400 00
Vice-president Fusz, visiting directors in Montana in May, 1896.....	73 20
Treasurer Rumsey, salary as treasurer and acting president....	2,010 28
A. W. Ewing.....	50 00
Jesse B. Mellor, salary as secretary....	7,760 01
Office boys at St. Louis....	1,089 85
Telephone.....	595 20
Office, office supplies, subscription to newspapers, in St. Louis.....	2,147 94
Louis S. McClure, as attorney's fee..	700 00

Bimetallic M. Co., a corporation, attorney's fee, in March, 1893.....	562 55
Also an entry as "inexplicable shortages" from 1896 to 1897.....	5,076 00
Also an entry in favor of Paul A. Fusz, C. T. Rhodes, Boyd Bros. and W. J. Schofield, for expenses of this suit.....	1,056 65
Demand note dated December 23, 1896, to the National Bank of Commerce in St. Louis, with interest at six per cent per annum from date.....	10,000 00
This note is signed "Combination Mining & Milling Co. Chas. D. McClure, Pres." There was also a deposit of 25,418 ounces ²⁴⁹ of silver bullion, having a value of \$16,000, made to secure the payment of this note.	
Demand note dated March 4, 1897, to the National Bank of Commerce in St. Louis, interest at six per cent per annum from date.....	10,000 00
This note is signed, "Combination Mining & Milling Co., by M. Rumsey, Acting President." A deposit of 32,172 ounces of silver bullion, then having a value of some over \$20,000, was made as security for the payment of this note.	
Demand note dated March, 1899, to State National Bank of St. Louis, interest at five per cent per annum.....	3,500 00
This note is signed, "Combination Mining & M. Co., by M. Rumsey, Acting President."	
"Promissory note or writing obligatory," dated June 18, 1898, to State Bank of St. Louis, due six months after date, with interest at eight per cent per annum from maturity.....	18,000 00
This instrument is signed, "Combination M. & M. Co., Chas. D. McClure, President."	
Amount collected on assessment of June 18, 1898..	10,605 95
Amount claimed to have been loaned and advanced to company by President McClure.....	9,583 30
Maintaining office at Butte since return in October, 1898, at \$180 per month.....	
Disposition of the proceeds derived from the sale of the silver bullion deposited as security.....	

1. It is claimed by respondents that it does not appear that plaintiffs had first exhausted their remedy within the corpora-

tion, and cannot maintain this suit. The plaintiffs make no complaint against the corporation as such, or against the other stockholders thereof, but seek relief against the individual trustees and officeholders, who, it is alleged, have been and are now fraudulently diverting and misappropriating the funds of the corporation, and were attempting to sell the stock of plaintiffs to satisfy an illegal assessment levied by the same individual defendants. The corporation is necessarily made a party to the action. Though in the name of the plaintiffs, the action is in reality on behalf of the corporation: *Beach v. Cooper*, 72 Cal. 99, 13 Pac. 161.

The action being directed against the trustees and officeholders, it would be idle to require the plaintiffs to first make the demand against those officials that they bring suit against themselves; and it further appears that one of the purposes for which the suit was brought was to restrain the sale of stock under an assessment levied in St. Louis in June, 1898; that this ²⁵⁰ stock would become delinquent August 5th of the same year, and would be sold on the 10th of the following September, a period of little over thirty days intervening between the alleged levy of the assessment and the time when the same would become delinquent. If it were possible in that limited time for plaintiffs to counsel with all the other stockholders or call a stockholders' meeting to consider the same, such action would be unnecessary, for the reason that, had all the other stockholders refused to interfere with the assessment, any stockholder owning a single share of stock would have the right to bring the action in his own name to prevent his own property from being sacrificed to satisfy an illegal assessment. If the allegations of the complaint are not sufficient to entitle the action to be considered as brought on behalf of others than the plaintiffs, its sufficiency as an action in their own behalf is not impaired by the averments that they bring it for others as well as for themselves: *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

In *Forrester v. Boston & Montana etc. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353, the court says: "The law, which does not demand or request that a person or corporation sue him or itself, nor require the doing of any useless thing, as prerequisite to the accrual of a right of action, will, therefore, in the circumstances here existing, permit the plaintiffs to maintain suit to undo or prevent the acts of directors or stockholders, performed or threatened to be performed, if such acts be, as to plaintiffs, *ultra vires*": *Gerry v. Bismarck Bank*, 19 Mont. 199, 47 Pac.

201 *Kner v. Salt Lake Co.*, 33 Mich. 112, 53 N. W. 218, 1
 L. R. 411; *Fussner v. Boston & Montana etc. Min. Co.*
Kner, 217 Pa. 144; *Brewer v. Boston Theater*, 104 M
 174.

A court of equity having obtained jurisdiction for one purpose may retain that jurisdiction for all purposes of the action necessary to the complete protection of plaintiff's rights: *Equity Jurisprudence*, 2d ed. 2d ed. 1903, par. 11; *Over v. Sullivan*, 11 U. S. 199, 23 L. ed. 829; *Montana (Fussner v. Boston & Montana etc. Min. Co.)*, 27 Mont. 238, 72 P. 1000.

2. The method pursued by the defendant directors in the management of the company's business appears to have been to leave the matter almost wholly with the president and the secretary. The president had the custody and control of the money and funds of the company and had the authority to pay the same out on vouchers approved by the president and attested by the secretary, by checks signed by the treasurer as the president. The signing of these checks seems to have been done by the treasurer performed by the treasurer. The board of directors did not appear to have figured in the allowance or payment of accounts, nor is there anything in the record to the effect that the board of directors had ever ordered paid any accounts. The treasurer, it appears, kept no books, at all. The statements which he rendered would therefore be collated from the books kept by the secretary and the president. The president and the secretary were therefore charged with the knowledge of all the expenditures made, to whom they were made and for what purpose. The evidence of those two officials relative to the expenditures charged in the complaint as having been a misappropriation of the funds of the company is very meager. The president says he did not know what the seventy-five dollars was paid him for; it may have been for traveling expenses or honorarium. The secretary attempts no explanation. The president further says that he cannot tell what the \$500 paid him as attorney fee was for, except that it was in relation to salt contracts. The secretary's meager statements are to the same effect. The \$400 paid as attorney's fee to defendant Fuss is not explained by the president, but the secretary and Fuss say it was in connection with traveling expenses to Utah to investigate a process for working silver. No explanation whatever is made of the seventy-three dollars and seventy cents paid to Fuss, as stated on the books, for visiting directors in 1896.

fifty dollars paid Ewing, it is claimed, was for auditing. The \$1,089.85 was for expense of office boys at St. Louis 1892 to 1898. The \$595.20 charged for telephone was for that purpose at St. Louis during this period. The \$7.94 charged for office supplies, subscriptions to newspapers, etc., was for rent, stationery and books in St. Louis. \$700 paid to Louis S. McClure as attorney fee was simply him by the president, Charles D. McClure, to be used in "silver cause," though how it was used, and when, or whether at all, the record is silent. The attorney's fee paid the Metallic Company, of \$562.55, was to assist in paying expenses of a delegation sent to Helena to work for the creation of Granite county. No explanation is attempted of the \$5,076 charged as "inexplicable shortages." The \$1,056.55 charged in favor of Fusz, Rhodes, Boyd Bros. and Schofield, for the expenses of this suit, are alleged to be expenses incurred by Fusz and Mellor in preparing for the defense of this action. The money received on the two \$10,000 notes executed to the Bank of Commerce, St. Louis, it is claimed, was sent to Montana to be used for the benefit of the company. The \$3,500 note to the State National Bank of St. Louis, it is claimed, was used for paying the salary of Rhodes and Coy, and for purchasing goods. Rhodes was assistant secretary.

It is claimed that the proceeds of the \$18,000 note executed to the State Bank of St. Louis were used in taking up the other two \$10,000 notes.

It appears further that \$10,605.95 was collected on the void assessment of June 18, 1898, and was paid to the president; that the \$9,515.41 claimed to have been loaned to the company by the president was for the purpose of refunding to the stockholders the amount paid in on this void assessment. The president says this amount paid in on this void assessment was used by the company, and he says: "I advanced the amount to the company, and the money was used for care-taking, insurance, taxes and other necessary running expenses, and interest." He also adds that no salaries were paid out of the above funds to officers. Whether the president has reference to the money loaned by him to the company, or to the \$10,605.95 when he says it was used by the company for insurance, taxes, running expenses, etc., and that no part was paid for salaries, cannot be gathered from his general answer. The secretary, Mellor, in testifying relative to expenditures of the amount paid in on this void assessment, says "that \$5,400 of it was retained by

the president." Then he corrected that statement, and said the amount retained by the president was \$6,364.92. On redirect examination he states that this amount retained by the president was \$5,074.79; also that a check was drawn in favor of M. Rumsey for \$675; that a check was also drawn in favor of A. W. Ewing for fifty dollars; that another check was drawn in favor of Mr. Fusz for \$487.50. None of these checks had been paid. The only explanation of the \$180 per month charged for maintaining the office in Butte is that "it is necessary expense." The record shows that thirty-five dollars of this was for rent. What the other was for is not explained. The testimony further shows that \$250 per year is the reasonable expense of maintaining the company's office at Butte, and doing the necessary bookkeeping, and that \$5,000 per year was ample to protect the company's property and to pay the insurance and taxes.

On the — day of —, 1900, the National Bank of St. Louis brought suit in the United States circuit court for the district of Montana against the defendant company, and recovered judgment by default against said company for the amount of the \$3,500 note, and also for the amount of the \$18,000 note, which had been assigned to the plaintiff; the amount of said judgment being \$29,903.06. Execution was issued, and the personal property of the defendant company sold to the Bimetallic Mining Company, a corporation operated by defendants, for \$800, and the real estate was sold to the plaintiff in that action for \$29,075. Defendant Charles D. McClure also obtained a default judgment against the defendant company for \$9,583.30, for the money alleged to have been loaned by him to repay the void assessment, and for sixty-seven dollars and eighty-nine cents paid out on account of the company. Sale of this property under execution was made on May 11, 1900. In the statement made by Treasurer M. Rumsey, on January 6, 1898, the personal property belonging to the company is listed, with a value thereof, and amounts to several thousand dollars. One diamond drill alone ²⁵⁴ is listed at \$3,247.60. The return of the United States marshal does not specify the items of personal property sold. The defendant corporation was not operating its mines during any of this period, and the record does not contain any explanation of this enormous decrease in the value of its personal property. When the company closed its operations in 1893, the reasons for such action given was low price of silver. In 1895, when operations were resumed, it is shown that silver was still lower than when the

company closed in 1893, but the defendant alleged that it was for the purpose of working off supplies then on hand; yet it appears that in February, 1897, when operations were finally closed, the company had on hand more than \$20,000 of supplies, and it is not in the record that any disposition was ever made of them.

The record does not contain any specific authority from the board of trustees to any of the officials to negotiate these loans or to execute these notes; neither does the entry of any of these charges in the books of themselves, in the form there appearing in the light of this evidence, show that the expenditures were for legitimate corporate purposes, the plaintiffs having shown that neither of the parties to whom an attorney's fee was credited was in fact an attorney. Under the rule which the officials claimed was their guide, the president and secretary were to be given vouchers for these several expenditures, but at this hearing these vouchers were either not produced, or, if produced, they contained no information as to what the items were expended for. It is claimed by defendants that the word "attorney" should be read "agent." The donation to Louis S. McClure and to the Bimetallic Mining Company were clearly outside of the purposes for which the corporation was created, both being for strictly political purposes. The statute specifies the purposes for which corporations may be created. Political purposes do not appear in the enumeration. The stockholders of the company, for aught the record here shows, were not unanimous in their political beliefs, or in the desire to have this new county created. It is also possible that a majority of the stockholders ²⁵⁵ may have sanctioned all these actions of these directors and of these officials in such a manner as to be binding upon them, but, if so, it is on the ground of estoppel, and is not binding upon those stockholders who did not take part in these proceedings, or sanction, by act or acquiescence, the making of these expenditures: Cook on Corporations, par. 657. It further appears that the deposit of 57,590 ounces of silver made as security for the payment of the two \$10,000 notes was withdrawn and sold, but there is no evidence as to what became of the proceeds.

3. On February 25, 1893, four of the defendant directors assembled at St. Louis, and, on motion of Vice-president Fusz, voted three of their number, to wit, President Charles D. McClure, Vice-president Paul A. Fusz and Treasurer M. Rumsey, the salaries before mentioned. This resolution not only fixed

the salaries of these officials, but gave them back pay from the first day of January, 1893. Officers of a corporation are not, as of right, entitled to salaries. Neither has the board of directors the inherent power to vote a salary to any director. The power so to do must emanate from the stockholders, from statute or from by-laws legally adopted.

In *Blue v. Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655, the court, at page 521, 145 Ind., and page 656, 43 N. E., says: "In Thompson's Commentaries on the Law of Corporations, volume 4, section 4682, the rule with reference to the question presented by this plea is stated thus: 'The president of a corporation is always a member of its board of directors. In addition to his ordinary duties as a director, it is his function to preside at meetings of the board, and, together with the secretary, and by means of the corporate seal, where a seal is required, to authenticate the formal acts and contracts of the corporation. In respect of his right to compensation, he is subject ordinarily to the rule already stated with regard to directors; he is not entitled to any compensation for performing the ordinary duties of his office, unless the governing statute, or some by-law, regulation, resolution or contract, to which his own vote was not essential, has given it to him. As the law does not imply an agreement to pay ²⁵⁶ for such services, in order for him to recover compensation for them, he must at least show an antecedent, valid agreement to pay for them.' That the proposition stated in the text is correct, we have no doubt; that it is well fortified by the decisions, we know; and that the same rule applies to the office of vice-president, it is needless to suggest: . . . Thompson's Commentaries on the Law of Corporations, sec. 4380; *Loan Assn. v. Stonemetz*, 29 Pa. St. 534; *Cheaney v. Lafayette etc. Co.*, 68 Ill. 570, 18 Am. Rep. 584; *New York etc. Co. v. Ketchum*, 27 Conn. 170; . . . *Kilpatrick v. Penrose Bridge Co.*, 49 Pa. St. 118, 88 Am. Dec. 497; . . . *Hall v. Vermont etc. R. R. Co.*, 28 Vt. 401, 406; *Bliss v. Matteson*, 45 N. Y. 22; . . . *Maux Ferry etc. Co. v. Branegan*, 40 Ind. 361."

In *Pfeiffer v. Lansberg Brake Co.*, 44 Mo. App. 59, the court holds that one who is both a secretary and a director of a corporation is not entitled to compensation for services as secretary in absence of specific prearrangement therefor. On page 62 the court says: "The cases hold with great unanimity that directors of a corporation are not entitled to compensation for services as directors, unless by statute, by law or

prior action of the stockholders; that the law does not imply a promise on the part of the corporation to pay for such services; and that they cannot vote themselves compensation for such services after the services have been rendered"; citing a number of cases, among which appear *Eakins v. White Bronze Co.*, 75 Mich. 568, 42 N. W. 982; *Ashton v. Dashaway Assn.*, 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809; *Wood v. Lost Lake etc. Co.*, 23 Or. 20, 37 Am. St. Rep. 651, 23 Pac. 848.

In *McMullen v. Ritchie* (C. C.), 64 Fed. 253, the court holds that, in the absence of resolution or by-law, an officer of a corporation cannot predicate a claim against the company for services rendered as such officer: See, also, *Danville etc. Ry. Co. v. Kase* (Pa.), 39 Atl. 301; *McCarthy v. Mt. Tecarte etc. Water Co.*, 111 Cal. 328, 43 Pac. 956.

Defendants claimed that the board possessed this power under authority conferred by certain provisions of what they claim ²⁵⁷ are the by-laws of the corporation, and which were put in evidence by the defendants. Section 454 of the fifth division of the Compiled Statutes of 1887 conferred upon the directors of a corporation the authority to make by-laws. Whether the by-laws introduced in evidence in this case were ever legally adopted, so as to make them binding upon the stockholders or the corporation, will be hereafter considered. They are at least in this action binding upon the defendants. It appears to be a fact admitted that the five defendant trustees held a meeting in St. Louis, Missouri, December 1, 1892, and adopted this code of so-called by-laws, conferring upon themselves the authority to vote salaries, and then, under the authority thus conferred, proceeded afterward to vote three of their number the salaries complained of. This action of the officials in voting themselves salaries cannot be sustained, and the resolution must be declared wholly void: Civ. Code, sec. 2970 et seq.

In *Wickersham v. Crittenden*, 106 Cal. 327, 39 Pac. 602, the court holds that a salary, whether a fair one or not, voted by the trustees of a bank to one of their number as president, is unlawful, and he may be compelled to account therefor, where he took part in the proceedings, and his vote was essential to the adoption of the resolution.

Martin v. Santa Cruz Water Storage Co., 4 Ariz. 171, 36 Pac. 36, was an action by a secretary of a corporation to recover his salary. It appears that the by-laws adopted by the corporation authorized the board of directors to appoint a sec-

retary and fix his salary. The board consisted of five directors. Three of these directors met, and voted one of their number a salary as secretary. The supreme court, in affirming the judgment in favor of the defendant rendered in the district court, uses the following language: "The appellant was a director of the corporation, and intrusted with its interest in a fiduciary capacity. He owed to his principal his fair, impartial and disinterested judgment in fixing the salary of its secretary. The corporation had the right to demand of him his entire vigilance in its behalf. It is intolerable that an agent be suffered to act at the same ~~and~~ time, in the same matter, for himself and principal, too. The result of such a course, if allowed, would be manifest. The act of a fiduciary agent in dealing with the subject matter of his trust, or the interest intrusted to his care and keeping, to his own individual gain and profit, is viewed by the courts with great jealousy, and will be set aside on slight grounds. The doctrine is founded on the soundest morality, and is frequently recognized: *Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 323. All transactions so tainted are voidable, without regard to the fairness or honesty of the act: *Graves v. Mono Lake Min. Co.*, 81 Cal. 303, 22 Pac. 665. And so a director of a corporation cannot vote himself a salary: *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846; *Butts v. Wood*, 37 N. Y. 317. The rule is enforced with great rigor against officers voting themselves salaries: *Thompson on Liability of Officers*, 351. They cannot properly act on, nor form part of a quorum to act on, a proposition to increase their compensation: *Bank v. Collins*, 7 Ala. 95. Certainly they cannot vote themselves 'back pay.' It is like giving away the assets of the corporation: *Cook on Stocks and Stockholders*, p. 756, sec. 657; *Holder v. Lafayette etc. R. R. Co.*, 71 Ill. 106, 22 Am. Rep. 89." See, also, *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Hardee v. Sunset Oil Co. (C. C.)*, 56 Fed. 51.

In *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854, the court, in considering the legality of the act of four directors of a corporation in voting three of their number salaries, says: "They are agents of the corporation, and, as in cases of other agents, their acts on behalf of their principal, in matters where their interests come in conflict with those of the corporation—their self-interest may tend to deprive the corporation full, free and impartial exercise of the judgment and dis-which they owe to their principal—are looked upon stinized with great jealousy by the courts. Their acts

in such cases are prima facie voidable at the election of the corporation or of a stockholder: *Cumberland Coal etc. Co. v. Parish*, 42 Md. 598; *Coleman v. Second Ave. Ry. Co.*, 38 N. Y. 201; *Hoyle v. Plattsburgh etc. Ry. Co.*, 54 N. Y. 314, 13 Am. Rep. 259 595; *Blake v. Buffalo Creek Ry. Co.*, 56 N. Y. 485; *Covington etc. Ry. Co. v. Bowler*, 9 Bush, 468; *Paine v. Lake Erie etc. Ry. Co.*, 31 Ind. 283; *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *European etc. Ry. Co. v. Poor*, 59 Me. 277; *Bestor v. Wathen*, 60 Ill. 138; *Harts v. Brown*, 77 Ill. 226; *Simons v. Vulcan Oil etc. Co.*, 61 Pa. St. 202, 100 Am. Dec. 628; *Rice's Appeal*, 79 Pa. St. 168; *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Gardner v. Butler*, 30 N. J. Eq. 702. The rule is applied rigorously to votes giving themselves compensation: *Thompson on Officers of Corporations*, 351, and note; *Maux Ferry Gravel Ry. Co. v. Branegan*, 40 Ind. 361." To the same effect are the decisions in *Miner v. Belle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; *Ten Eyck v. Pontiac etc. Ry. Co. (Mich.)*, 3 L. R. A. 378, note; *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846; *Hill v. Rich Hill C. M. Co.*, 119 Mo. 9, 24 S. W. 223; *Cook on Corporations*, 5th ed., 657; 10 Cyc. of Law Proc. 899.

4. It is claimed that it was advantageous to the company to have its office at St. Louis; that it could purchase its supplies with two other companies operated by defendants; could get a lower rate of interest; and that St. Louis was a good silver stock market. Why all this could not have been accomplished through an office in Montana is not apparent. The record shows that the principal supplies required by the company were quicksilver, powder, salt, mining machinery and mining supplies; that all these were purchased in California, Utah, Montana and at Chicago; and that the product of the mines were silver bullion, which was marketed in New York. There is some evidence to the effect that defendant L. M. Rumsey sold some supplies to the company on competitive bids, but neither the character nor the amount of these supplies is stated. It is not explained what advantage the company received from a telephone service at St. Louis, or from the employment of office boys there, when all the actual mining operations were carried on in Montana. Neither does it appear that this company received any benefit whatsoever by reason of maintaining the office at St. Louis that ²⁶⁰ would not have accrued to it had the office been kept at the place designated in the articles of incorporation. Neither can the charge of \$1,056.65 made by

defendants Fusz and Mellor against the defendant corporation as cost incurred by them in preparing their defense in this action be sustained.

5. The law under which this company was incorporated is chapter 25, fifth division, of the Compiled Statutes of 1887. That statute provided that the certificate filed with the secretary of the territory should designate the city, town or locality and county in which the principal business of the company should be transacted: Sec. 449. That section also provided that the company might designate a place of business outside of the territory, but the certificate should so state.

Sections 468 and 486 of the same division provided the manner in which a company organized under that chapter, or prior to the enactment of that law, might come under, and avail itself of, the privileges and provisions in said chapter granted.

This company, it will be noticed, did not follow this procedure in the removal of its office to St. Louis. That statute undoubtedly means that the company, while maintaining its principal office within the state, may designate a subordinate office outside of the state; but there is no law any place which authorizes the removal of the principal office from the jurisdiction in which the company was created. The resolution passed at the stockholders' meeting in June, 1892, provides for the removal of the home office and directory of the company from the city of Butte to the city of St. Louis. The testimony is that this office was actually moved to St. Louis, and that the books, papers and records of the company were taken to St. Louis, and that the office at Butte, designated in the articles of incorporation as the principal office of the company, was actually closed and abandoned. By reason of this action the records of the company were removed beyond the jurisdiction of the state in which the corporation was created, and where it actually transacted its mining business. The funds of the company were also removed. The record of the actions of the board of directors was kept at ²⁶¹ St. Louis. Expenditures were made from there. The stock-books were kept there—all beyond the reach and jurisdiction of the state of Montana. Local stockholders had no means of ascertaining just what was done by the board of directors, except by journeying to St. Louis. These acts were without warrant or sanction of law, and must therefore be held ultra vires, and not binding on anyone who did not participate therein.

It is true that corporations organized in one state may transact business in a foreign state. It is likewise true that persons who deal with corporations in such foreign state may be estopped from disputing the validity of the transactions. But we know of no principle of law that authorizes a corporation to move its principal business office from and beyond the jurisdiction of the state in which the corporation was created.

In *MacGinniss v. Boston etc. Min. Co.*, 29 Mont. 428, 75 Pac. 89, this court uses this language: "The officers of a corporation are trustees. By their acts in engaging in an unlawful enterprise, and making the corporation a party to it, they are guilty of a breach of trust, and both they and the corporation can be held to account by a court of equity, at the suit of a minority stockholder who has not participated in the violation of the law."

It is also true that directors of a corporation may transact much business outside of the state, but they have no right to move the entire official business of the corporation beyond the state, and the acts of these directors in attempting to hold regular monthly meetings and to sit as the board of directors of the corporation at St. Louis, Missouri, were acts ultra vires.

6. It is also claimed by the defendants that these various acts of the board of directors were subsequently ratified by the board at a regular meeting held in Butte, Montana, October 27, 1898, and at the various stockholders' meetings held at Combination, Montana, during the time that the directors were maintaining the office in St. Louis. The action of defendants in meeting at Butte after the commencement of this action, and attempting by their own votes to ratify their own previous actions ²⁶² of which complaint is here made, can have no significance in this case. At each of the various meetings held in Combination, Montana, during the time that the trustees were maintaining the principal office in St. Louis, Missouri, the following resolution was passed: "Resolved, that all the acts of the trustees and officers of this company in conducting its business for the year last past and now closed, be and the same is hereby approved." It appears, however, that none of the matters complained of in this suit were presented to the stockholders. The only purpose for which these meetings were called, as stated in the notice, was to elect directors. No other business was specified. No statements were presented as to the conditions of the company or as to what business had been transacted by the directors. These meetings were attended in

person by only a few of the stockholders, though proxies for a majority of the stock were present. The defendants and their friends held a majority of this stock. The resolution appears to be the same in substance as that quoted in *Farmers' Loan etc. Co. v. San Diego St. Car Co.* (C. C.), 45 Fed. 518, which in that case was held insufficient as a ratification. As stated in *Martin v. Santa Cruz Water Storage Co.*, 4 Ariz. 171, 36 Pac. 36: "The act claimed as a ratification is not a direct, substantive act, with that object in view." We have, as a result, should we treat this action as a ratification, some of these very defendants who voted for this resolution, and who, we are justified in saying from this record, caused its adoption, indorsing and ratifying their own wrongful acts, which cannot be permitted.

It is further claimed that the plaintiffs have been guilty of laches. There might be some force in this contention if the complaint here made only went to a single act, but the same course of conduct was pursued up to the very commencement of this proceeding. There is no room here for any claim that either the corporation or the minority stockholders have acquiesced in or ratified this conduct: *Miner v. Belle Ice Co.*, 93 Mich. 112, 53 N. W. 218, 17 L. R. A. 412.

7. Certain matters were admitted in evidence, over the objections ^{and} of the plaintiffs, the competency of which has not heretofore been passed upon. The record of the stockholders' meetings held in Montana during the time that the office was kept at St. Louis, and certain parts of the so-called by-laws, were admitted over the objection that they had never been legally adopted. Objection was also made to certain parts of the depositions of witnesses McClure and Fusz. All this evidence was considered by the referee and court at the trial, and has been herein treated as forming a part of this record, but the objections have not been passed upon. The minutes of the stockholders' meetings consisted of separate sheets of paper pinned to the leaves of a record-book, and this was their only identification. This was insufficient. These minutes should have been rejected as not properly identified. In the matter of the introduction of the by-laws, the plaintiffs had first introduced a part thereof with a reservation that they did not admit their legality, but at the same time maintained that they were not legally adopted. These by-laws introduced by plaintiffs, as well as those introduced by defendants, were all recorded in the same book, and, the plaintiffs having introduced a part of the

by-laws over the objections of defendants, the defendants had the right to introduce the remaining part: Code Civ. Proc., sec. 3130.

The objections made to the depositions of the witnesses McClure and Fusz were principally to the effect that their answers to some of the questions were not responsive, were indefinite and evasive, or were conclusions of the witnesses. It must be admitted that a part of the testimony of these witnesses is not of that certain and positive character which a cestui que trust has a right to expect and demand from his trustee, but we find no reversible error in its admission in this particular action.

8. It appears affirmatively from the record that no part of the money paid to or withheld by the defendants as salaries was on account of any services performed by them in or about the operation of the company's mines. On the contrary, it appears that no such services were performed by defendants, and that ²⁸⁴ a sum exceeding \$13,000 was paid as salaries while the mines were lying idle. Defendant Mellor says he never resided in Montana. His services as secretary, for which he was paid more than \$7,000, were confined to St. Louis. The necessity for negotiating these loans at St. Louis, for the repayment of which the company's property was sold on execution, was caused, if such necessity did in fact exist, by the wrongful act of the defendant directors in voting the salaries to the president, vice-president and treasurer, and to their secretary stationed at St. Louis. These acts of the directors are made fraudulent by the provisions of Civil Code, section 2976: *Miner v. Belle Ice Co.*, 93 Mich. 112, 53 N. W. 218, 17 L. R. A. 412. Defendant Mellor was, however, at no time a director nor does the record connect him with any fraudulent transaction. The officials however, who caused this money to be paid to him, may be required to account therefor.

We recommend that the judgment and order be reversed, and that the cause be remanded to the district court for further proceedings.

Per Curiam. For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded, with directions to the district court to set aside its findings and to proceed in accordance with the views therein expressed.

A Rehearing was Granted in the principal case, and the opinion on rehearing as delivered by Mr. Chief Justice Brantly is reported in *Am. St. Rep.*, Vol. 104—46

IN PAR. 1-4. In such opinion all of the questions decided in the opinion in the principal case are reaffirmed, and in addition questions as to amendments made by the board of directors of the corporation in question are decided as follows: 1. That in an action against the directors of a corporation for fraudulent misappropriation of its funds, sums paid to the president and vice-president, and charged to to the corporation as attorneys' fees, neither of such officers being attorneys, must be charged against the defendants unless the sums were actually paid out to attorneys for the benefit of the corporation. 2. That the expenses of the president and vice-president of the corporation in attending stockholders' meetings and in visiting directors are not presumed to be proper charges against the corporation. 3. That expenses of lobbying a bill through the legislature incurred by the directors of a corporation cannot be charged against it as against misappropriating stockholders. 4. That although it is within the power of the directors of a corporation to employ a secretary and pay him a salary, as well as to incur necessary expenses for office and office help, yet such expenses charged by directors as incurred at a time when the corporation was not in active operation are prima facie improper. 5. That directors cannot charge to the corporation expenses incurred by them in defending a suit brought against them by the minority stockholders to recover for their fraudulent misappropriation of the corporation's funds. 6. That loss caused by the mismanagement of an employee of the corporation or by a shortage in the value of supplies, is not chargeable against the directors of the corporation individually unless they knowingly and voluntarily allowed such employee to pursue a course of action which made the loss equivalent to a fraudulent misappropriation of the corporation's funds. 7. That prima facie the directors of a corporation have a right to maintain an office at the principal place of business of the corporation within the state, and that the rent charged for such office is prima facie reasonable, may be charged against the corporation, and the directors are not liable to account for it. 8. That as it is the duty of directors of a corporation to obtain money to pay corporate expenses either by borrowing or levying assessments, the obligation of the corporation to repay money borrowed for such purpose is not affected by the fact that the directors have fraudulently misappropriated part of it, even though the requirements of the by-laws of the corporation as to the execution of the evidence of indebtedness were not strictly complied with. 9. That a judgment obtained by the directors of a corporation against it for money expended by them for it is a charge against it to be satisfied out of its assets, and it and its directors have accounted for any corporate funds misappropriated by them.

IN PAR. 5 CONCERNING IN THE CASE THE COURT SAID: "The judgment and order granting a new trial are reversed, and the cause is remanded to the district court, with directions to take an account of all moneys wrongfully paid out by the defendant directors, and to charge them thereon with interest thereon at the legal rate upon each item from the date of its misappropriation until the date of the account, and to render a judgment against them for the amount so found due. For this purpose the court should hear such other testimony as may be necessary to take the account in accordance with the suggestions herein contained."

Actions by Stockholders on behalf of the corporation are discussed at length in the monographic note to Johns v. McLeester, 97 Am. St. R. 29-32.

The Doctrine of Ultra Vires in relation to the contracts of private

corporations is the subject of a monographic note to *In re Assignment Mutual etc. Ins. Co.*, 70 Am. St. Rep. 156-180.

On the Right of Directors of a Corporation to a Salary or to compensation for their services, see *Ten Eyck v. Pontiac etc. R. R. Co.*, 74 Mich. 226, 16 Am. St. Rep. 633; *Martindale v. Wilson-Cass Co.*, 134 Pa. St. 348, 19 Am. St. Rep. 706; *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658, 32 Am. St. Rep. 228; *Wood v. Lost Lake Mfg. Co.*, 23 Or. 20, 37 Am. St. Rep. 651; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Taussig v. St. Louis etc. R. R. Co.*, 166 Mo. 28, 89 Am. St. Rep. 674.

The Holding of Directors' Meetings outside the state as affecting the validity and effect of contracts entered into or authorized at such meetings is considered in *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95, 78 Am. St. Rep. 560; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187; *Missouri Lead Min. Co. v. Reinhardt*, 114 Mo. 218, 35 Am. St. Rep. 746.

LONGTIN v. PERSELL.

[30 Mont. 306, 76 Pac. 699.]

NUISANCE—Exercise of Care.—Blasting Operations carried on continuously for more than one year on premises platted for city purposes constitute a nuisance *prima facie*, irrespective of the degree of care exercised, and recovery may be had for injury to neighboring property, arising from concussions of the air. (p. 728.)

Toole & Bach and M. S. Gunn, for the appellants.

Nolan & Loeb, for the respondents.

²⁰⁶ **HOLLOWAY, J.** Numerous errors are assigned, but it is conceded that they all raise but one question. Appellants contend that they are not liable for damages caused to respondent's premises by reason of the vibrations of the earth or concussions of the air resulting from the blasting done by them, where no negligence is alleged or proved, and, in support of this contention, rely upon the decisions in the following cases: *Benner v. Atlantic Dredge Co.*, 134 N. Y. 156, 30 Am. St. Rep. 649, 31 N. E. 328, 17 L. R. A. 220; *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552, 35 N. E. 592, 24 L. R. A. 105; *Simon v. Henry*, 62 N. J. L. 486, 41 Atl. 692; *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923, 47 L. R. A. 715.

Benner v. Atlantic Dredge Co. was an action by a property owner against the dredge company which had a contract with the government of the United States to remove an obstructi-

to navigation from East river, New York. In the performance of its work the dredge company used explosives, by reason of which plaintiff's building was injured. The court held that the defendant was not liable in the absence of a showing of negligence, but based its decision upon the ground that the general government had absolute power to make or have made the improvement mentioned, and could not be held liable for damages resulting therefrom, and that the defendant had all the authority which the government had to select the means necessary to be employed. The court said: "The defendant had the authority of the government, and kept within it, and therefore is not liable."

Booth v. Rome etc. R. R. Co., 140 N. Y. 267, 37 Am. St. Rep. 552, 35 N. E. 592, 24 L. R. A. 105, was an action by a property owner against the railroad company to recover damages for injuries ³⁰⁰ caused by the explosion of blasting powder. It appeared that it was necessary for the company to do the blasting in order to make necessary excavations for its track. In the opinion of the court, emphasis is laid upon the fact that this blasting was only a temporary expedient, necessary to reduce the property to the use for which it was intended, and the court makes a distinction between a case of that kind and one where the blasting is carried on continuously.

Simon v. Henry, 62 N. J. L. 486, 41 Atl. 692, was an action by a property owner against certain defendants who had a contract with the municipal authorities of the town of Union, New Jersey, to construct a public sewer for the town. In making excavations in the street, the defendants employed blasting powder. The plaintiff's property was injured because of concussions of the air consequent upon the explosions of such powder. The decision of this case is made upon the authority of Booth v. Rome etc. R. R. Co., 140 N. Y. 267, 37 Am. St. Rep. 552, 35 N. E. 592, 24 L. R. A. 105, and with reference to that case it is said: "In Booth v. Rome etc. R. R. Co. . . . it was held that the temporary use of explosives in the blasting of rock, provided reasonable care be exercised, is lawful, and damage resulting from concussion thereby produced is *damnum absque injuria*."

Sullivan v. Dunham, 161 N. Y. 290, 76 Am. St. Rep. 274, N. E. 923, 47 L. R. A. 715, was an action by an administrator to recover damages for the unlawful killing of her intestate. Certain parties were employed by defendant Dunham to cut trees growing on his land near a public highway. The

employés used dynamite in their operations, and, as a result of an explosion under a tree, a portion of the stump thrown into the public highway, along which plaintiff's intestate was traveling, killed her. It was conceded that defendants were on their own land, engaged in a lawful occupation, and no negligence was charged against them, but they were held liable. On principle, this case would seem to be opposed to appellants' contention, rather than support it. However, in the body of the opinion this language is used: "When the injury is not direct, but consequential, such as is caused by concussion, which, by shaking the earth, injures property, there is no liability, in the absence ³¹⁰ of negligence"; citing *Benner v. Atlantic Dredge Co.*, 134 N. Y. 156, 30 Am. St. Rep. 649, 31 N. E. 328, 17 L. R. A. 220, above. This seems to be purely dictum. The question of damages caused by concussions of the air or vibrations of the earth was not before the court. The cause of the injury was a portion of a tree thrown by force of the explosion of dynamite against the person killed. Neither is the doctrine announced supported by the authority cited, for, as we have already seen, the case of *Benner v. Atlantic Dredge Co.*, 134 N. Y. 156, 30 Am. St. Rep. 649, 31 N. E. 328, 17 L. R. A. 220, was decided upon a wholly different ground.

We are not prepared, then, to agree with counsel for appellants that the courts of New York and New Jersey have announced the doctrine that for injuries sustained by the property of one, by concussions of the air caused by blasting on the property of another, no damages can be recovered in the absence of negligence on the part of the party causing the injury.

The court of appeals of New York has held that damages resulting from explosions of powder, which cast fragments of rock onto the property of another, can be recovered, even though no negligence be alleged or proved: *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258. And the supreme court of New Jersey has held that in a case where defendant stored a large quantity of blasting powder within the city limits of Jersey City, which by accident exploded, causing injury to plaintiff's property, defendant was liable, in the absence of any showing of negligence: *McAndrews v. Collerd*, 42 N. J. L. 189, 36 Am. Rep. 508. We can perceive no reason for recovery in these latter cases which is not equally cogent in the one at bar, but, even if these courts should hereafter follow the rule contended for by

appellants, we are not disposed to do so, for it appears contrary to reason and the great weight of authority.

In *City of Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, the city owned a stone quarry on property adjoining plaintiff's property, and employed one Ardner to quarry and break stone for use upon the streets of the city. In his operations the employé used blasting powder, and, as a result of one ³¹¹ blast, fire was communicated to plaintiff's buildings, which were damaged thereby. The city was held liable, and the court said: "As between the owners of adjacent lands, the maxim of the common law, 'Sic utere tuo ut alienum non laedas,' applies with special force, not because it forbids the exercise of the right of dominion or control of property, according to the pleasure of the owner, in one case more than in another, whether it be real or personal property, or whether it be owned for special or general uses, but because the right to use or control it according to the pleasure of the owner is limited under some circumstances more than under others. Undoubtedly the right to use property as the owner may please, provided that reasonable care is taken not to do unnecessary injury to others, is the ordinary rule. But this rule cannot be interposed to justify the committing of a trespass or the maintaining of a nuisance."

In *Bradford Glycerin Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 71 Am. St. Rep. 740, 54 N. E. 528, 45 L. R. A. 658, the defendant owned and operated a nitroglycerin plant. A certain quantity of this material, stored in a magazine, exploded, causing damage to plaintiff's property. The defendant contended, as appellants contend in this case, that it was not liable, for the reason that the damage was not caused by fragments of rock or other material being hurled against plaintiff's building or onto his property, but by violent atmospheric vibrations caused by the explosion. The defendant, however, was held liable in the absence of any showing of negligence, the court basing its opinion, apparently, upon the case of *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, and *Fletcher v. Rylands*, L. R. 3 H. L. 330, where emphasis is laid upon the fact that the use made by the defendant of its premises was an extraordinary or unusual one, and constituted a nuisance.

In *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659, the defendant operated marble works on property adjacent to plaintiff's property. The defendant used steam power in operating a machine for cutting stone, and the jarring of plaintiff's building, caused by the operation of this machinery, damaged the

312 building, for which the defendant was held liable, though no negligence on his part was alleged or proved. The court reviewed the authorities at length, and held that the maxim, "*Sic utere tuo ut alienum non laedas*," applies in a case of this kind. It does seem that the same reason which justifies recovery in an action of this character would likewise justify recovery in the case at bar.

In *Fitzsimons v. Braun*, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421, the defendants were contractors of the city of Chicago, engaged to make excavations for water mains. It was necessary to use blasting powder in the prosecution of their work. The blasts caused concussions of the air and vibrations of the earth's surface to such an extent as to injure plaintiff's building. The defendants claimed that they did the work with due care, and were not guilty of any negligence whatever, particularly as there was no actual invasion of plaintiff's property by fragments of earth or rock thrown upon it. But the court held them liable for the injuries sustained, and, among other things, said: "If one who, for his own purposes and profit, undertakes to perform a work, by means of explosives, inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by the explosives on the property of such other, it is only by the merest subtilty of reasoning he should be held not liable only to respond for equal or greater damage caused by the concussion of the air or of the earth. There is no ground of substantial or practical distinction. The case of *Bradford Glycerin Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 71 Am. St. Rep. 740, 54 N. E. 528, 45 L. R. A. 658, may be regarded as authority for the view that liability in such cases is not restricted to an actual invasion of the property, but damages for consequential injuries may be recovered."

Colton v. Onderdock, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395, is a case the facts of which are practically identical with those in the case now under consideration. The defendant relied upon the proposition that, as he had performed his work in a careful and prudent manner, he could not be held liable. **313** But the court held otherwise, and, in disposing of his contention, said: "The fact that the defendant used quantities of gunpowder—a violent and dangerous explosive—to blast out rocks upon his own lot, contiguous to another person's, situate in a large city, must be taken as an unreasonable, unusual and unnatural use of his own property, which no care or skill in so

doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling-house, as the natural and proximate result of his blasting. For an act which in many cases is in itself lawful becomes unlawful when by it damage has accrued to the property of another. And it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling-house, or a concussion of the air around it, which had either damaged or entirely destroyed it. The defendant seems by his contention to claim that he had a right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable or natural consequence. But in this he is mistaken."

If the damage to plaintiff's property had been caused by fragments of rock thrown upon his property or against his dwelling-house by the blasting which defendants were doing, the authorities are practically unanimous in holding that the defendants would be liable, even though they exercised reasonable care in their operations: Cooley on Torts, 332. We can see no reason whatever for adopting that view, and at the same time holding that they are not liable for damages occasioned by the vibrations of the ground or the concussion of the air. The agency employed in either case is the same, and the danger as imminent in one instance as in the other.

It is to be observed that the defendants here were operating upon lots platted for city purposes, and that their operations³¹⁴ were continuous over a period of at least one year. The liability arises from the unusual or extraordinary use to which appellants put their property, the fact that their operations were continuous, and that in these operations they used explosives in such quantities as to cause injury to plaintiff's property. These facts are at least prima facie evidence that appellants were maintaining a nuisance, and they cannot justify by showing that in maintaining such nuisance they exercised due care.

So far as this record discloses, plaintiff was entitled to the quiet and peaceable possession and enjoyment of his property, and could properly invoke, as against these appellants, the rule of the common law quoted above.

The judgment and order are affirmed.

On the Liability for Injuries Caused by Blasting, see *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274; *Mitchell v. Prange*, 110 Mich. 78, 64 Am. St. Rep. 329; *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552; *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151, 32 Am. St. Rep. 786; *Klepsch v. Donald*, 4 Wash. 436, 31 Am. St. Rep. 936. Where injuries are inflicted by exploding gunpowder in a thickly settled part of a city, the persons causing the explosion are not relieved from liability by the fact that they employed careful and experienced men and exercised the highest degree of care: *Munro v. Pacific etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248. See, too, *Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. Rep. 221.

FORDHAM v. NORTHERN PACIFIC RAILWAY CO.

[30 Mont. 421, 76 Pac. 1040.]

APPELLATE PRACTICE.—Objection that the bill of exceptions was not served in the manner provided by law is waived by presenting amendments to the proposed bill. (p. 731.)

APPELLATE PRACTICE.—Notice of intention to move for a new trial, though not incorporated in the record, is no ground for the dismissal of an appeal from the judgment. (p. 731.)

WATERCOURSES—Overflow Waters.—If the flood and overflow water from a river becomes severed from the main current or leaves it never to return and spreads out over the lower ground, it becomes surface water, but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs therefrom, presently to return, it is still to be regarded as a part of the stream, and cannot be obstructed to the injury of the property of another. (p. 734.)

WATERCOURSES.—Overflow Waters of a river which still form part of the channel of the stream cannot be obstructed by a railroad company by a continuous and uninterrupted fill along its right of way, to the injury of the property of another, without liability therefor. (p. 735.)

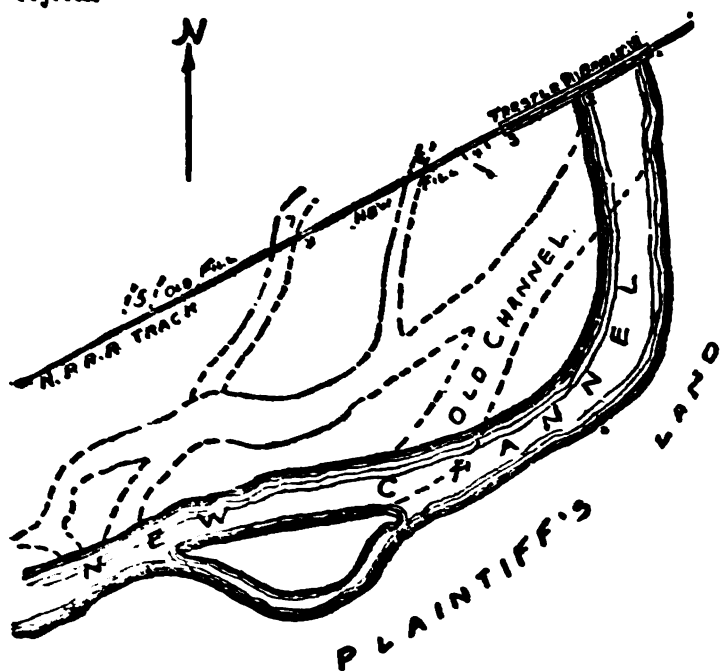
A. L. Duncan and Nolan & Loeb, for the appellant.

W. Wallace, Jr., for the respondent.

⁴²¹ **HOLLOWAY, J.** This action was brought by the plaintiff (appellant here) to recover damages alleged to have been caused by the wrongful act of the defendant railway company. The plaintiff owns certain lands situated along the south bank of the Bitter Root ⁴²² river. A portion of these lands are lowlands, and comprise the bottom land of the river at that point. The defendant railway company owns a right of way across the low or bottom land of the river on the north side directly opposite the plaintiff's lands. Its railroad track is constructed on this right of way, and substantially parallel with the

river for some distance. Near the northernmost line of plaintiff's land the river turns to the north, and is crossed by defendant's railroad by means of a bridge. Prior to 1897 there was open trestlework supporting the track for fourteen hundred feet west from the west pier of the bridge. From the west end of this trestle was a solid embankment or fill, constructed in 1887, but concerning which no complaint is made.

In 1897 the railway company constructed a solid embankment or fill from the east end of the old fill to a point two hundred and eighty-five feet west of the west pier of the bridge. The subjoined diagram illustrates the relative situations of these objects.



423 During every spring or early summer, when the snow in the mountains at the headwaters of the Bitter Root river and its tributaries is melting rapidly, the Bitter Root overflows its banks and spreads over the plaintiff's lands, and over the low lands across which defendant's right of way extends. The general slope of the country is toward the north, so that prior to 1897 flood or overflow waters ran off through defendant's trestle to the north, and some distance below fell into the channel of the river again. Plaintiff contends that by reason of the

fill or embankment made in 1897 the flood waters of the river were held back, raised and caused to overflow her land on the opposite side of the river during the annual overflows in 1898 and 1899 to a much greater extent than theretofore, and when the waters receded during these years a new channel of the river was cut wholly on plaintiff's land, wasting and destroying from ten to twenty acres of valuable agricultural land, and causing damage to her in the amount claimed at least.

Upon the conclusion of plaintiff's testimony, which tended to prove the facts herein set forth, the trial court sustained a motion for nonsuit, and entered judgment for defendant for costs, from which judgment plaintiff appealed.

⁴²⁷ It is conceded that the railway company constructed the fill in 1897 on its own land. It is alleged in the answer that this new fill was necessary to avoid "dangerous and difficult curves and grades and to avoid annoyances to public travel," and this is not denied.

Respondent railway company contends that the bill of exceptions was not served in the manner provided by law; but this objection is waived by the respondent presenting amendments to the proposed bill of exceptions. The purpose of the statute (Code Civ. Proc., sec. 1831) is to insure that the person upon whom service is sought shall actually receive, if possible, the document to be served; and when a party appears, and presents and has allowed his amendments to a proposed bill of exceptions, he is hardly in a position to say that he has never actually received a copy of the same.

Respondent also contends that the appeal should be dismissed for the reason that the notice of intention to move for a new trial is not in the record. This is untenable, first, for the reason that this is an appeal from a judgment, and not from an order ⁴²⁸ overruling a motion for a new trial; and, second, respondent's contention is disposed of adversely to it by the decision in *King v. Pony Gold Min. Co.*, 28 Mont. 74, 72 Pac. 309.

Respondent also contends that there was an extraordinary flood during 1898 and 1899, and that one Rockramer had placed a dike or embankment along the north bank of the Bitter Root river further west than respondent's new fill, and that this dike was, or may have been, the proximate cause of the damage to plaintiff's land. But neither of these facts appear from the record in this case sufficiently to deserve further consideration. At most there is but a hint of the existence of either.

The only serious question for determination is, Are these flood or overflow waters of the Bitter Root river, which, prior to 1897, flowed off over the lowland now crossed by respondent's new fill, to be treated as a part of a natural watercourse or as surface waters? And this question is to be resolved independently of the question whether the common-law rule or civil-law rule respecting the disposition to be made of these waters after their character is determined prevails in this state.

It must be conceded that, if these overflow waters are to be treated as the other waters of the Bitter Root river when within its banks and the low, bottom land across which defendant's right of way extends as a natural watercourse during flood times, then defendant had no right to interfere with the natural flow of such waters to the damage of plaintiff, and the court erred in granting a nonsuit.

1. Are these overflow or flood waters of the Bitter Root river to be treated as surface waters or as a part of the natural watercourse? The decisions are in hopeless conflict upon this subject, and no useful purpose can be served by a review of them. Upon the same state of facts different courts have decided the question differently. In Indiana, Missouri, Kansas, Nebraska and Washington it is held that these overflow waters are surface waters, to be dealt with as such according to the rule prevailing in those states: *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113; *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249, 40 Pac. 275; *McCormick v. Kansas City etc. Ry. Co.*, 57 Mo. 433; *Morrissey v. Chicago etc. Ry. Co.*, 38 Neb. 406, 56 N. W. 946; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114.

In California, while a distinction is apparently made between overflow waters and surface waters, the common-law rule respecting surface waters is held applicable to overflow or flood waters: *Gray v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163, 32 Pac. 976, 21 L. R. A. 593.

"By the common law, flood water overflowing the banks of a stream is a part of the stream, though not flowing in a channel, and a riparian owner is not allowed to protect his lands by erecting barriers to the injury of another. This is clearly so in case the flood spreading beyond the banks of the stream forms with the stream one body, and flows within the accustomed boundaries of such floods": *Jones on Easements*, sec. 729; *Rex Trafford*, 10 Bing. 413; *Adol.* 874; *Trafford v. Rex*, 8 Bing.

In Georgia, Ohio, Iowa, Virginia, Minnesota, South Carolina, Wisconsin and Tennessee it is held that these flood or overflow waters are still a part of the stream, and to be treated as such: *O'Connell v. East Tennessee etc. Ry. Co.*, 87 Ga. 246, 27 Am. St. Rep. 246, 13 S. E. 489, 13 L. R. A. 394; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 29; *Sullens v. Chicago etc. R. R. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; *Moore v. Chicago etc. Ry. Co.*, 75 Iowa, 263, 39 N. W. 390; *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247; *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339; *Jones v. Seaboard Air Line Ry. Co.*, 67 S. C. 181, 45 S. E. 188; *Spelman v. City of Portage*, 41 Wis. 144; *Barden v. City of Portage*, 79 Wis. 126, 48 N. W. 210; *Carriger v. East Tennessee etc. Ry. Co.*, 7 Lea, 388.

While a federal court usually follows the decisions of the highest court of the state in which such federal court is held, especially with reference to questions of local law or practice, the United States circuit court for the district of Indiana first decided that this question is one of general law, and then refused ⁴⁸⁰ absolutely to follow the decisions of the supreme court of Indiana respecting this subject. The supreme court, in *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114, and subsequently, held that these overflow waters are surface waters; but the federal court, after carefully reviewing these decisions, says: "The waters cast into a stream by ordinary floods must have a channel in which they are accustomed to flow, and, if they have, that channel is a natural watercourse, with which no riparian proprietor can lawfully interfere to the injury of another. If there is a natural water way or course, and its existence is necessary to carry off the water cast into the stream by ordinary floods, that way is the flood channel of the stream; and, if it is the flood channel of the stream, the water which flows there cannot be regarded as surface water. Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which the water is accustomed to flow. . . . It must necessarily follow from this general principle that, where water naturally flows, though the volume may change with the varying seasons, there is a natural watercourse, even though at times the place where the water flows in ordinary floods may become entirely dry. It can make no difference that the boundaries within which the water flows change with varying seasons, for the way which nature has provided for its flow is

the stream and water flowing in that waterway is not surface water. . . . With reasonably near approximation to accuracy, it may be said here as a general rule that all the waters of a river which form one body when flowing within the boundaries within which they have been immemorially accustomed to flow in times of ordinary floods, constitute waters of the river, and are not surface waters": *Cahill and Ry. Co. v. Belmont* (C. C.), 42 Fed. 289, 35 L. R. A. 537.

The annual overflow of the Bitter Root river is caused by the melting of the snow in the mountains many miles from the land in controversy. The water is collected in the main channel, and named river, until by the addition of the waters of ^{and} its tributaries, the whole amount exceeds the capacity of the channel in which the waters of the river ordinarily flow when these floods or overflows occur. The source of supply in low water and high water is the same, the only difference being the quantity of water precipitated by that supply. We are of the opinion that great difficulty would be experienced in attempting to distinguish between the river waters proper and the overflow waters, where they form one continuous body, and in attempting to apply a particular rule to one and another rule to the other.

Without attempting to reconcile the diverse decisions, we are of the opinion that the following rule furnishes the safest guide for the determination of a question which has vexed the courts of many of our states as well as those of England, viz.: Whether the water from the overflow of streams is to be considered as still a part of the watercourse, or to be treated as surface water, shall depend upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current, or leaves the same never to return, and spreads out over the lower ground, it becomes surface water. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel presently to return, it is to be regarded as still a part of the stream: 13 Am. & Eng. of Law, 2d ed., 637.

Applying the foregoing definition to the facts of this case, we are of the opinion that the waters in question, which were obviously defined by the new fill or embankment, were a part of

our Political Code provides: "The com-
far as it is now repugnant to or incon-

istent with the constitution of the United States, or the constitution or laws of this state, or of the codes, is the rule of decision in all the courts of this state." We are unable to find anything in the common-law rule respecting these waters or watercourses repugnant to or inconsistent with the constitution of the United States or the constitution or statutes of Montana, and therefore hold that the common law must be enforced as the rule of decision in this case. This is the construction given by the courts of other states to a statutory provision similar to section 5152, above: *Edwards v. Charlotte etc. R. R. Co.*, 39 S. C. 472, 39 Am. St. Rep. 746, 18 S. E. 58; *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113; *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575.

By this we do not mean to say that respondent may not maintain the whole or any part of the fill constructed in 1897. Its right with respect to this is limited by the provision that it shall provide suitable means of escape for the waters of the Bitter Root river at its ordinary flood or high water, so that plaintiff's land shall not, by reason of such fill, be compelled to bear any greater burden of such overflows than it bore prior to 1897. In other words, the railway company's right to maintain this fill is subject to the limitation imposed by the maxim "Sic utere tuo," etc., as liberally translated in our Civil Code, section 4605: "One must so use his own rights as not to infringe upon the rights of another": *Jones on Easements*, 729; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429; *Sinai v. Louisville etc. Ry. Co.*, 71 Miss. 547, 14 South. 87.

This is an ancient rule of the common law—not of the civil law, as contended by counsel—and, in our opinion, is particularly applicable to this case. It imposes no undue hardship upon the railway company, for in locating its right of way and in constructing its roadbed the company was bound to take notice of the known habits of the Bitter Root river, and to build with reference to them. If the view contended for by respondent be accepted, the railway company would be at liberty to fill up the remaining trestle west of the bridge, and would only be compelled to leave sufficient room under its bridge to accommodate the waters of the river itself as defined by its banks.

While the position taken by the trial court and by counsel for respondent finds support in the decisions of the highest courts of many of the states, we think the rule herein announced the better one, and sustained by the decided weight of authority. The judgment is reversed and the cause is remanded.

Surface waters are such as lie upon or spread over the surface of the ground and to run flow in any particular direction: *Case v. Hoffman*, 44 Wm. 428, 16 Am. St. Rep. 937. As to whether the overflow or flood waters of a natural stream are to be regarded as surface waters, see *Chicago and R. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 702; *Case v. Deeks*, 14 Wash. 75, 53 Am. St. Rep. 859; *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 215, 49 Am. St. Rep. 849; *Kansas City and R. R. Co. v. Smith*, 73 Miss. 677, 48 Am. St. Rep. 579; *City v. McWilliams*, 98 Cal. 187, 15 Am. St. Rep. 163; *O'Connell v. East Tennessee and Ry. Co.*, 87 Ga. 245, 27 Am. St. Rep. 246; *Byrne v. Montpelier and Ry. Co.*, 38 Minn. 212, 8 Am. St. Rep. 658; *Sullivan v. Chicago and Ry. Co.*, 74 Iowa, 619, 7 Am. St. Rep. 501. The right of one land owner to accelerate or impede the flow of water to or from the lands of another is discussed in the monographic note to *Minnell v. McEwen*, 85 Am. St. Rep. 727-735.

CASES
IN THE
SUPREME COURT
OF
OHIO.

HOPKINS v. CLYDE.

[71 Ohio St. 141, 72 N. E. 846.]

LIMITATIONS OF ACTIONS, Plea of, When not a Personal Privilege.—When an action to foreclose a mortgage seeks the sale of real estate which has vested in the widow and heirs at law of the mortgagor either by will or descent, they, or either of them, or the successor in interest of either, may plead the statute of limitations in protection of the estate from foreclosure and sale. (p. 739.)

LIMITATION OF ACTIONS.—A Purchaser at a Judicial Sale Acquires the Right and Title of the Judgment Debtor in the real estate sold, and may therefore plead the statute of limitations in protection of such property if the judgment debtor could do so. (pp. 739, 741.)

LIMITATIONS OF ACTIONS—Who may Plead Against the Enforcement of a Lien.—Anyone in privity with a lien sought to be foreclosed against premises or anyone who can be said to stand in place of the person in whose favor the statute of limitations runs, is entitled to plead it. (p. 740.)

Suit commenced May 20, 1902, to foreclose a mortgage executed June 22, 1885, by George C. Clyde and his wife to secure the payment of a note due one year thereafter. The mortgagor died intestate several years after the maturity of the note, but before the commencement of this suit, leaving surviving him his widow and four children, all of whom were made parties defendant and failed to answer. On July 5, 1902, W. A. Hopkins was, on his application, made a party defendant. He, by his answer and cross-complaint, pleaded title by virtue of a judgment and sale against one of the heirs at law and a sheriff's deed executed thereunder after the commencement of this suit, and that the note sued upon had become due more than fifteen years before such commencement, and it and the mort-

gage were barred by the statute of limitations. A demurrer to this answer was sustained by the trial court, and its judgment was affirmed by the circuit court.

Gilbert, Shipman & Campbell, for the plaintiff in error.

Sherman T. McPherson, for the defendants in error.

¹⁴⁴ PRICE, J. It is not seriously questioned that the mortgagor, George C. Clyde, if living, could make the plea of the statutory bar, against both the note and the mortgage securing the same, if more than fifteen years had elapsed between the maturity of the debt and the commencing of the action to foreclose the mortgage.

Nor can it be seriously argued that the widow and heirs at law of the mortgagor could not successfully interpose the plea in their behalf against the mortgage, because they are in undoubted privity of estate with the mortgagor, which estate vested in them at his decease. The authorities are unanimous in support of the latter proposition, and while the right to plead the statutory bar to the promissory note is a personal privilege to be exercised by its maker or his legal representative when the action seeks the sale ¹⁴⁵ of real estate which has vested in the widow and heirs at law, either by will or by descent, they or either of them may make the plea in protection of their estate from foreclosure and sale.

But it is urged in this case that the plaintiff in error does not stand in such privity of estate with the mortgagor or his heirs at law, as entitles him to make this defense. What are the facts he alleges?

On the 14th of February, 1898, more than three years prior to the filing of the action to foreclose, the Henry St. Clair Company recovered a judgment in the court of common pleas of Miami county against Kate C. Davis, one of the heirs of the mortgagor, for three hundred and four dollars and eighty-seven cents and costs of suit. On the 25th of February of same year an execution was issued on this judgment, and it was levied on the undivided one-fifth of the real estate covered by the mortgage, which was the interest of said Kate C. Davis in the premises. After the judgment and levy Mrs. Davis conveyed her interest to Neva O. Coppock. In October, 1901, the judgment creditor commenced a suit against Kate C. Davis and her said grantee to enforce the judgment, and in that suit, an order of sale was issued, and on the twenty-fourth day of May, 1902,

the said one-fifth interest formerly owned by Mrs. Davis was sold by the sheriff to the plaintiff in error, which sale was confirmed by the court, and in pursuance of its order the sheriff executed and delivered to him a deed for said interest in said mortgaged premises.

By virtue of the judgment against Kate C. Davis, the execution, order of sale, the sale by the sheriff, its confirmation, and the deed of the sheriff, the plaintiff in error became seised of all the rights, title and interest which she had theretofore held in the premises ¹⁴⁶ as one of the heirs of the mortgagor, and he became a tenant in common with the other heirs of the mortgagor, entitled as against them to bring and maintain proceedings for the partition of the real estate, and to enforce any and all the rights, and be subject to the liabilities of a tenant in common, which might accrue under his new relation.

It is true, the plaintiff in error did not receive a deed directly from Kate C. Davis, and thus connect himself with the title of the mortgagor, yet he became seised of all her interest just as effectually by the legal proceedings referred to. Our statute so provides in section 5402 of the Revised Statutes, where it is said: "The deed [sheriff's] shall be prima facie evidence of the legality and regularity of the sale; and all the estate and interest of the person whose property the officer so professed to sell and convey, whether that interest existed at the time the property became liable to satisfy the judgment or was acquired subsequently, shall be thereby vested in the purchaser."

Both by common law and surely by virtue of this statute, the purchaser at such judicial sale acquires all the right and title of the judgment debtor in the real estate. Of course such purchase and the deed acquired thereunder do not of themselves free the premises purchased in this case of the prior mortgage lien for what may be due upon the mortgage, but does the purchaser thereby have such relation to the mortgaged estate that he may show in protection of his interest in the premises that the action to foreclose the mortgage is barred by lapse of time? It is argued by counsel for defendant in error that the grounds of defense ¹⁴⁷ against the mortgage, including the right to plead the statutory bar, which belonged to Kate C. Davis, did not pass by the judicial sale of her interest in the premises, because the title of plaintiff in error is not one in privity with the title of the mortgagor. The first part of the proposition may be true, namely, that the right to plead the statutory bar

purchasers. 3. A subsequent mortgagee or purchaser of the equity of redemption can avail himself of the protection of the statute of limitations against a prior mortgage, although the mortgagor is a party to the action and refuses to plead the statute." The opinion in that case cites *Jones on Mortgages*, sec. 1509; *Lent v. Shear*, 26 Cal. 361; *Medley v. Elliott*, 62 Ill. 532; *Fox v. Blossom*, 17 Blatchf. 352, Fed. Cas. No. 5008.

If a junior mortgagee may so defend, so may a subsequent purchaser.

¹⁴⁹ In the case at bar, while the death of the mortgagor occurred before the statute had fully run, yet it had run its full course at the date of the order of sale and the sale of the interests of Mrs. Davis in the mortgaged premises. At that time she and the other heirs at law of the mortgagor held but the equity of redemption. The equity of redemption in favor of Mrs. Davis was certainly sold to the plaintiff in error and he acquired it at the judicial sale above referred to. Hence, on the ground that he holds the equity of redemption in one-fifth of the encumbered premises, he is entitled to plead the statutory bar for the protection of his title.

The authorities to support the doctrine of this opinion are very numerous, if not unanimous, as witness *Trimble v. Fariss*, 78 Ala. 260; *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Lent v. Shear*, 26 Cal. 361; *Houston v. Workman*, 28 Ill. App. 626; *Schmucker v. Sibert*, 18 Kan. 110, 26 Am. Rep. 765. We quote from the latter case the following: "Again, when the note is barred, the mortgage is also barred, and a grantee of the mortgagor may interpose this defense to an action to foreclose the mortgage whether the mortgagor does or not. He may protect the property conveyed to him by a plea of the statute, as to any lien sought to be charged against it. He cannot interpose the plea beyond the extent of his interest, and therefore only to prevent a foreclosure."

"In *Coster v. Brown*, 23 Cal. 142, the court decided that 'a purchaser of an estate subsequent to the mortgage, may intervene and plead the statute,' and further, when the debt to secure which a mortgage is given is barred by the statute of limitations, the mortgage is also barred, and if an action is ¹⁵⁰ brought to foreclose it, one who has purchased or acquired a lien on the property subsequent to the mortgage has a right to intervene in the action and plead the statute of limitations": See, also, *Ewell v. Daggs*, 108 U. S. 143-147, 2 Sup. Ct. Rep. 408, 27 L. ed. 682.

It would seem that reasoning from any view point we may have of the question the answer and cross-petition of plaintiff in error contains a good defense against foreclosure as to his share of the premises, and if true, that he is entitled to have the cloud of the mortgage thereon removed.

The judgments of the lower courts are reversed and the demurrer to the answer and cross-petition overruled, and the cause is remanded to the common pleas court for further proceedings according to law.

Spear, C. J., Davis, Shauck and Crew, JJ., concur.

Summers, J., not sitting.

WHO MAY PLEAD THE STATUTE OF LIMITATIONS.

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I. Scope of Note.

In this note we shall discuss only those cases which adjudicate the right of a person, based on his status, to plead the statute of limitations as distinguished from those cases in which the right of the person to do so is conceded, provided that he brings himself within the terms and conditions of the statute, or, in other words, we shall endeavor to exclude from our consideration those cases involving the question whether the facts and circumstances are such as to make the statute of limitations operative. Hence, we shall exclude from our consideration all cases involving a suspension of the running of the statute of limitations by reason of such disabilities as coverture, infancy, insanity and the like. The right to plead the statute where governmental bodies are parties litigant, having been treated by us in the very recent note to Bannock County v. Bell, 101 Am. St. Rep. 144, we shall not discuss the subject in this note. Nor shall we discuss the general principles, theories or policy of statutes of limitation. For a discussion of the subject from that standpoint, see the monographic notes to Menzel v. Hinton, 95 Am. St. Rep. 656, and Bannock County v. Bell, 101 Am. St. Rep. 144. And for a discussion of the requirements of an acknowledgment or new promise to suspend or remove the bar of the statute, see the monographic note to Warren v. Cleveland, 102 Am. St. Rep. 751.

II. Nature of the Right to Plead the Statute of Limitations.

a. **The Right as a Personal Privilege.**—The right to interpose the statute of limitations in a suit is a privilege which is personal to the person entitled to plead the statute: Cartwright v. Cartwright, 68 Ill. App. 74; Schuberth v. Schillo, 177 Ill. 346, 52 N. E. 319; Dunton v. McCook, 93 Iowa, 258, 61 N. W. 977; Gentry v. Field, 143

Mo. 399, 45 S. W. 286; *Trustey v. Lombard* (Or.), 78 Pac. 895; *Mason v. Taft*, 23 R. I. 388, 50 Atl. 648; *Welton v. Boggs*, 45 W. Va. 620, 72 Am. St. Rep. 833, 32 S. E. 232; *McCartney v. Tyrer*, 94 Va. 198, 26 N. E. 419; *Hanchette v. Blair*, 100 Fed. 817; *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30 L. ed. 1105. Hence the court cannot of its own motion interpose the plea: *Smith v. Hutchinson*, 78 Va. 683. Nor can the unsecured creditors of a debtor compel the debtor to plead the statute of limitations as a bar to a recovery by other creditors: *Anderson v. McNeal*, 82 Miss. 542, 34 South. 1; *Christie v. Bridgman*, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429. Since the statute of limitations is generally considered as not extinguishing the debt, but merely taking away a remedy for its enforcement (*Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728; *Menzel v. Hinton*, 132 N. C. 660, 95 Am. St. Rep. 647, 44 S. E. 385; *Relyea v. Tomahawk Paper etc. Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412), the legislature may make such statutes apply to nonresidents and minors as well as to others: *Sweet v. Boston*, 186 Mass. 79, 71 N. E. 113. Though the general rule is as has been stated, namely, that the plea is purely a personal privilege, still there are some apparent exceptions to the rule. The rule in this regard was illustrated by Chief Justice Field in the oft-cited case of *Lord v. Morris*, 18 Cal. 482, in the following language: "But it is said that the plea of the statute is a personal privilege of the party and cannot be set up by a stranger. This, as a general rule, is undoubtedly correct with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control or subjected by him to liens, he has no such personal privilege. He cannot at his pleasure affect the interests of other parties. His grantees or mortgagees, with respect to the property, stand in his shoes, and can set up any defense that he might himself have set up to the action, either to defeat a recovery of the property or its sale": See, also, *Grattan v. Wiggins*, 23 Cal. 16, to the same effect.

b. *Right to Waive the Privilege.*—From what has been said in the preceding paragraph it naturally follows that if the rights of others are not concerned as a matter of right, the debtor may waive the defense of the statute of limitations: *Bell v. Rice*, 50 Neb. 547, 70 N. W. 25; *Quick v. Corlies*, 39 N. J. L. 11; *Clark v. Augustine* (N. J. Eq.), 51 Atl. 68; *Noyes v. Hall's Estate*, 28 Vt. 645. Hence it has been declared that other creditors cannot complain because the debtor has waived the statute of limitations as to claims due him: *Brigham v. Fawcett*, 42 Mich. 542, 4 N. W. 272. So, also, a debtor not being obliged to plead the statute, it is held no objection to an assignment for the benefit of creditors that a debt barred by limitations was included in the list of liabilities: *Swearingen v. Hendley*, 1 Posey (Tex.), 639.

But where third persons have acquired an interest in mortgaged property subsequent to the mortgage, they may invoke the aid of limitations as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection: *Wood v. Goodfellow*, 43 Cal. 185. Of course, the exceptions to the rule are based on privity of the parties or an interest in a certain fund. Thus, in *Rawlins v. Rawlins*, 75 Ga. 632, it was held that while generally it is a personal privilege to plead the statute of limitations, yet where a wife files a bill against her husband and the administrator of his father's estate to subject his interest in that estate to her claim for alimony, it would be inequitable to change an uncertain and invalid claim against the husband in favor of the estate into a certain and valid claim, and thus defeat the claim of the wife for alimony out of the portion coming to the husband from his father's estate. But with respect to an ordinary creditor, as distinguished from the claim of a wife against the husband for maintenance, a contrary rule was announced in *Re Sheppard's Estate*, 180 Pa. St. 57, 36 Atl. 422. In that case it was held that a legatee whose share had been attached by a creditor could confess judgment in favor of the estate on a bona fide debt due decedent, which is barred by limitations, and which more than offsets the legatee's share.

It is, however, said to be the duty of a municipal board to plead the statute of limitations when it can do so under the facts: *Trowbridge v. Schmidt*, 82 Miss. 475, 34 South. 84.

In a suit between an administrator and creditors, the plea of limitations is not strictly personal to the administrator. It is his duty to interpose it as a defense, and where he neglects or declines to do so, the heirs or any other party to the action interested in the fund liable to be reached by the creditors may set it up: *McKinlay v. Gaddy*, 26 S. C. 573, 2 S. E. 497. But it seems that he is not bound to plead limitations unless, under facts known to exist, it can avail as a successful defense: *Roberts v. Rogers*, 28 Miss. 152, 61 Am. Dec. 542. Nor is he bound to plead the statute if the personal assets in his hands are sufficient to pay decedent's debts, though it seems that he is bound to plead it where a resort to realty is necessary to raise a fund to pay such debts: *Pollard v. Secar*, 28 Ala. 484, 65 Am. Dec. 364. And it seems that he is not bound to plead the statute where it would be detrimental to the estate to do so: *Estes v. Browning*, 11 Tex. 237, 60 Am. Dec. 238. But under other circumstances it appears that he must plead the statute: *Dawes v. Shed*, 15 Mass. 6, 8 Am. Dec. 80; *Rogers v. Rogers*, 3 Wend. 503, 20 Am. Dec. 716; *Batson v. Murrell*, 10 Humph. 301, 51 Am. Dec. 707. On the general subject of the right of an administrator or executor to waive the statute of limitations, see the monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 188. But very often the rule that an executor or administrator is bound to plead the statute of limitations is based to a large extent on the statutes with

respect to the duties of such legal representatives. The force of such statutes was adverted to in *Smith v. Pattie*, 81 Va. 654, although the court, in discussing the subject, also said: "The statute of limitations, while it is purely a personal privilege as to a living party, who may avail himself of it or not as he may choose, is not such as to an executor or administrator, because there is no privity of contract between them and a testator, or intestate's creditor, the law does not presume that they can know whether a demand is just or unjust; and hence there is a manifest distinction taken between the declarations and promises of the original debtor and those made by a personal representative, who may have no personal knowledge of the transactions."

In *Woodyard v. Polsley*, 14 W. Va. 211, it was held that after a man was dead and his estate was being distributed among his creditors in a court of equity, a creditor might rely on the statute of limitations to defeat the claim of another creditor, but the decision appears to have been based upon a statutory provision requiring the legal representatives of a deceased person to avail themselves of the plea of limitations.

c. *Estoppel of Right to Plead the Statute.*—A party may be estopped from relying on the statutes of limitation: *Davis v. Ramage*, 23 Ky. Law Rep. 1420, 65 S. W. 340; *Lamb v. Clark*, 5 Pick. 193; *Lengar v. Hazlewood*, 79 Tenn. (11 Lea) 539; *Park v. Prendergast*, 4 Tex. Civ. 566, 23 S. W. 535. Thus, where grantees accept a deed reciting that they agree to pay and assume a mortgage, they are estopped to deny the validity of the mortgage, or that it was an existing encumbrance at the date of their deed, because of being barred by limitations: *Christian v. John*, 111 Tenn. 92, 76 S. W. 906. And where a toll road corporation ceases to operate its toll road, it cannot plead limitations in bar of recovery by the original owner, of land on which it had erected a toll-house: *Cynthiana etc. Turnpike Co. v. Hutchinson*, 22 Ky. Law Rep. 1233, 60 S. W. 378. And where payment is provided for out of a particular fund or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued: *Davis v. Simpson*, 25 Nev. 123, 83 Am. St. Rep. 570, 58 Pac. 146. See, also, *Sawyer v. Colgan*, 102 Cal. 283, 36 Pac. 580.

The fact that the party invoking the statute of limitations may have put it in motion by his own default in the performance of a contract is no obstacle to its operation: *San Antonio etc. Loan Assn. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386. But, on the other hand, it is said that the participant in the breach of a trust cannot plead the statute: *Duckett v. National Mechanics' Bank*, 86 Md. 400, 63 Am. St. Rep. 513, 38 Atl. 983, 39 L. R. A. 84. Thus it has been held that where a county misappropriates common school funds, it cannot set up the statute of limitations in a suit for their recovery: *Board v. State*, 106 Md. 531, 7 N. E. 254. For a further

discussion of the subject with respect to occasions where trust relations exist, see subdivision IV.

A plea of limitations will not be allowed where it would be inequitable and would perpetuate a fraud upon the creditor in the face of the oral promises not to plead the statute in consideration of delay or forbearance in pressing the claim: *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481; *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555. In the same manner, an agreement to arbitrate the claim may estop the debtor from pleading the statute: *Davis v. Dyer*, 56 N. H. 143. So, also, where the defendant had negotiated for the settlement of certain notes against an estate, and had led the plaintiff to believe that no resistance would be made to the allowance of the notes, the court held that the defendant could not plead the statute of limitations: *Wilson v. McElroy*, 83 Iowa, 593, 50 N. W. 55. See, also, *Renackowsky v. Board of Water Commrs.*, 122 Mich. 613, 81 N. W. 581, to the same general effect. Likewise, one who willfully led plaintiff to believe that payments made at plaintiff's request to a creditor of plaintiff were payments on a certain debt, is estopped from asserting that they were not such payments, and thus make the statute of limitations available: *Chase v. Carney*, 60 Ark. 491, 31 S. W. 43. In *Newton v. Carson*, 80 Ky. 309, where plaintiff delayed suit for twenty days on the promise of a surety to confess judgment on the note in controversy at the end of that time, the court held that the delayed time should be excluded in computing the period of limitations. The general rule in this respect is this, namely, that where a party obtains delay by promising not to avail himself of the bar of limitations, he is estopped from pleading limitations: *Holman v. Omaha etc. Co.*, 117 Iowa, 268, 94 Am. St. Rep. 293, 90 N. W. 833; *Missouri Pac. Ry. v. Coombs etc. Co.*, 71 Mo. App. 299; *Barcroft v. Roberts*, 91 N. C. 363.

But it was held in *Cameron v. Cameron*, 95 Ala. 344, 10 South. 506, where the payee of a note asks maker to renew it, and he replies that it would never run out of date, his personal representatives, in an action on the note after his death, are not estopped from pleading limitations.

So, also, it is held that no equitable estoppel can arise after limitations have run against action for subscription to stock, so as to prevent a subscriber from pleading limitations: *Pittsburgh etc. Co. v. Graham*, 36 Pa. St. 77. In this connection see the monographic note on acknowledgment or new promise to suspend the running or remove the bar of the statute of limitations, attached to *Warren v. Cleveland*, 102 Am. St. Rep. 751.

III. General Rule as to Who may Plead the Statute of Limitations.

The right to plead the statute of limitations is privilege which is personal to the debtor and may be availed of by others only when they stand in the relation of privity of estate to the debtor, such

as a subsequent purchaser or encumbrancer of the legal title, or one in privity with the claim or demand, or one who has succeeded to or may be said to occupy the place of the debtor: *Tinsley v. Lombard* (Or.), 78 Pac. 895; or as was said in the principal case (*Hopkins v. Clyde*, ante, p. 737), anyone in privity with a lien sought to be foreclosed against premises or anyone who can be said to stand in the place of the person in whose favor the statute of limitations runs is entitled to plead it.

In a general way, the authorities recognize the rule to be that the right to plead the statute of limitations is extended to all persons in privity with the person who originally had the right to plead the statute: *Wood v. Goodfellow*, 48 Cal. 185; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *Thompson v. Sickles*, 46 Barb. 49; *Hill v. Hilliard*, 103 N. C. 34, 9 S. E. 639; *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. 246; *Walker v. Burgess*, 44 W. Va. 399, 67 Am. St. Rep. 775, 30 S. E. 99; *Dawson v. Calloway*, 18 Ga. 573.

Where the bar of limitations is complete against the owner of land, it is complete against one claiming through him, whatever may be the character of the claim: *Smith v. Uzzell*, 61 Tex. 220.

The relation of privies may be created by operation of law, by descent or by voluntary or involuntary transfers from one person to another and denotes mutual or successive relationship to the same rights of property: *Nelson v. Trigg*, 4 Lea, 701.

The personal representatives having the exclusive right to bring suit in behalf of the estate for the benefit of creditors, heirs and devisees, where an action is barred against such representatives, it is also barred against the heirs, even though they be under disability: *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 870. So, also, where executors, administrators and other trustees for infants fail to sue for personal property within the statutory time, the infants are bound: *Worthy v. Johnson*, 10 Ga. 358, 54 Am. Dec. 393. And where a person during his lifetime, as executor, stands in the relation of trustee to a fund and cannot plead the statute of limitations in respect thereto, his representatives, after his death, stand in no better position and cannot plead the statute: *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897.

Hence we see that in determining who may plead the statute we find that the classes of persons who may do so are those who have the original right to do so, and those who have that right by reason of privity with those who have such original right.

IV. Application of the Rule to Various Classes of Persons.

a. As Dependent upon Legal Capacity of Party Invoking the Privilege.

1. *Nonresidents.*—There is a marked difference between the status of an absent resident and that of a nonresident with respect to the ability of the creditor to pursue them: *Connecticut Trust etc. Co.*

v. Wead, 172 N. Y. 497, 92 Am. St. Rep. 756, 65 N. E. 261. The rights of nonresidents to plead the statute of limitations is a matter which naturally is determined by the statutes of the various states. In **Milton v. Babson**, 6 Allen, 322, it was held under the Massachusetts statutes that one who had never lived in Massachusetts could not avail himself of the statute of limitation in an action on a note given in that state. In **Wetmore v. Marsh**, 81 Iowa, 677, 47 N. W. 1021, a nonresident mortgagee was held not entitled to plead limitations in a proceeding to foreclose a mechanic's lien. While in **Bannon v. Lloyd**, 64 Md. 48, 20 Atl. 1023, nonresidents were held entitled to plead the statute of limitations.

2. Foreign and Domestic Corporations.—In **Larson v. Aultman etc. Co.**, 86 Wis. 281, 39 Am. St. Rep. 893, a foreign corporation was held to be a person "out of the state" and not entitled to avail itself of the statute of limitations. In this connection see **Barstow v. Union etc. Co.**, 10 Nev. 386; **Rathbun v. Northern Central R. Co.**, 50 N. Y. 656; **Kirby v. Lake Shore etc. Co.**, 14 Fed. 261; **Tioga R. Co. v. Blossburg etc. Co.**, 20 Wall. 137, 22 L. ed. 331. But a foreign corporation, having a local existence and domicile in the state for the purpose of suing and being sued, may rely on the statute of limitations to the same extent as though chartered by the state: **Huss v. Central etc. Co.**, 66 Ala. 472; **Lawrence v. Ballou**, 50 Cal. 258; **King v. National Min. etc. Co.**, 4 Mont. 1, 1 Pac. 727; **Thompson v. Texas Ind etc. Co. (Tex. Civ.)**, 24 S. W. 856; **Connecticut Mut. Life Ins. Co. v. Duerson**, 28 Gratt. 630.

With respect to domestic corporations, it seems that the statutes generally contain ample provisions to include them within those "persons" who may plead the statute of limitations. Thus in the early case of **People v. Rector etc. of Trinity Church**, 22 N. Y. 44, a corporation was held to be a "person" within the meaning of the statute of limitations with respect to the persons who could plead the statute: See monographic note to **Boyd v. Mutual Fire Assn.**, 96 Am. St. Rep. 972, on the statute of limitations in actions against officers and stockholders of corporations.

6. As Dependent upon Personal or Official Relations of the Parties.

1. Marital Relations.—The statute of limitations does not apply as between a husband and wife as a general rule: **Collins v. Babbitt (N. J.)**, 58 Atl. 481; **Burnham v. McMichael**, 6 Tex. Civ. 496, 26 S. W. 887. In **Gudden v. Gudden's Estate**, 113 Wis. 297, 89 N. W. 111, it was said that limitations do not run against a wife as between herself and husband so as to bar her claim against his estate for money loaned to him. But limitations run from the death of one of the spouses: **Gracie's Estate**, 158 Pa. St. 521, 27 Atl. 1083.

2. Fiduciary Relations.

A. In General.—As long as there is a continuing and subsisting trust, acknowledged or acted upon by the parties, the statute of

limitations does not apply, but if the trustee denies the right of the cestui que trust and the holding becomes adverse, lapse of time from that period may constitute a bar in equity, but other trusts which are the ground of an action at law are not exempted from the operation of the statute: See *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918; *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417; *Lexington Life etc. Co. v. Page*, 17 B. Mon. 412, 66 Am. Dec. 165. The rule was stated by the court in *Nash v. Ingalls*, 101 Fed. 645, in the following language: "Where the right was one purely of an equitable nature and remedial only in the court of chancery, the statute does not apply, but where the right is one upon which an action at law would lie, equity follows and applies the statute (of limitation) to suits brought in that forum."

But limitations run between a trustee and the cestui que trust in an implied or resulting trust: *Redford v. Clarke*, 100 Va. 115, 49 S. E. 630; *Miller v. Baker*, 166 Pa. St. 414, 45 Am. St. Rep. 680, 31 Atl. 121.

B. As Affecting the Trustee.—As long as the duties of a trustee remain undischarged he cannot avail himself of the statute of limitations to an action for the recovery of funds held by virtue of the trust, unless the trust is openly denied to the knowledge of the cestui que trust: *Trustees of Schools v. Arnold*, 58 Ill. App. 103. See, also, *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897, to the same effect. Limitations do not run in favor of a trustee against a beneficiary, but do run against a distributee in favor of a purchaser of personal property from an administrator: *Jordan v. McKenzie*, 30 Miss. 32. Nor do limitations run against the right of a voluntary trustee for a credit on accounting for expenditures for the maintenance of the beneficiaries: *In re Beisel's Estate*, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819. For an exhaustive review of the earlier authorities on the application of the statute of limitations as between trustee and cestui que trust, see the monographic note to *Miles v. Thorne*, 99 Am. Dec. 384.

The position of a trustee under a deed is different from that of a guardian or administrator, the trustee holding the legal while the cestui que trust holds the equitable title, whereas the heir or ward holds the legal title subject only to the right of the administrator or guardian to control the estate for the benefit of all parties interested in it or its administration: *Collins v. McCarthy*, 68 Tex. 150, 2 Am. St. Rep. 475, 3 S. W. 730.

As to whether the officers and directors of a corporation are technical trustees of an express trust, see the exhaustive discussion in the opinion of the court in *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918, where the authorities pro and con are reviewed. In *Harrisburg Bank*

v. Forster, 8 Watts, 12, the cashier of a bank was held not entitled to the benefit of the statute of limitations as to his own note lying in the bank where he did not exhibit the note as due and unpaid to the board of directors. The decision seems to have been based on the theory that the directors and cashier were trustees for the stockholders. So, also, in *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, the managers of a savings bank were held to stand in the relationship of trustees to the depositors so that the statute would not bar a charge of mismanagement on their part which had occurred more than six years before the filing of the bill. See, also, *Williams v. Reilly*, 41 N. J. Eq. 137, 3 Atl. 692, for a somewhat similar holding.

C. *As Affecting the Cestui Que Trust.*—Whenever the right of action in a trustee who has power to sue is barred, the right of the cestui que trust represented by him is also barred: *Molton v. Henderson*, 62 Ala. 426; *Patchett v. Pacific Coast Ry.*, 100 Cal. 505, 35 Pac. 73; *Knorr v. Raymond*, 73 Ga. 749; *Coleman v. Walker*, 60 Ky. (3 Met.) 65, 77 Am. Dec. 163; *Barclay v. Goodloe*, 83 Ky. 493; *Weaver v. Leiman*, 52 Md. 708; *Herndon v. Pratt*, 59 N. C. 327; *Williams v. Otey*, 27 Tenn. (8 Humph.) 563, 47 Am. Dec. 632; *McAdams v. McAdams*, 10 Tex. Civ. 653, 32 S. W. 87; *Sheppard v. Turpin*, 3 Gratt. 273; *Chase v. Cartwright*, 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90; *Meeks v. Olpherts*, 100 U. S. 564. This rule obtains even though the cestui que trust labored under the disability of coverture: *Collins v. McCarty*, 68 Tex. 150, 2 Am. St. Rep. 475, 3 S. W. 730; *Schiffman v. Schmidt*, 154 Mo. 204, 55 S. W. 451; or labored under the disability of infancy: *Wiess v. Goodhue* (Tex.), 83 S. W. 178; *Jenkins v. Jensen*, 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773. The rule that when the trustee is barred, the beneficiary is barred whether under disability or not, applies only when the trustee has the power to sue but fails to do so: *Parker v. Hall*, 2 Head (Tenn.), 641.

Where the trustee in whom property was vested for the benefit of a wife and children has permitted the property to be sold on execution and the purchaser to remain in possession over the statutory period, the children cannot recover the property: *Salter v. Salter*, 80 Ga. 178, 12 Am. St. Rep. 249, 4 S. E. 391. So, also, where the trustee who holds the legal title to trust property permits his right to bring ejectment for a certain part thereof to become barred, the beneficiary is also barred, even though a minor: *Ewing v. Shannahan*, 113 Mo. 188, 20 S. W. 1065; *Ferguson v. Kennedy*, Peck (Tenn.), 321, 14 Am. Dec. 761; and where limitations has run against a trustee to whom a bond is payable, the beneficiary is also barred from recovery: *Ervin v. Brooks*, 111 N. C. 358, 16 S. E. 240.

So, also, where the trustee holding the legal title to land in fee is barred, all of the cestuis que trustent are barred whether they are entitled in possession or in remainder, vested or contingent, and

whether they are *sui juris* or under disability: *Chase v. Cartwright*, 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90, 7 L. R. A. 403. And under such circumstances the *cestui que trust* for life as well as in remainder is also barred: *King v. Rhew*, 108 N. C. 696, 23 Am. St. Rep. 76, 13 S. E. 174.

D. As Affecting Strangers to the Trust.—The rule that the statute of limitations does not bar a trust estate holds only between the trustee and *cestui que trust* and not as between such parties on one side and strangers on the other side: *Jenkins v. Jensen*, 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773. Thus where a trustee of a married woman, having authority so to do, loans money to a stranger, the latter knowing that it is a trust fund and the transaction is not tainted with fraud, the statute of limitations is a good defense to the stranger as well in equity against the beneficiary as at law against the trustee: *Mason v. Mason*, 33 Ga. 435, 83 Am. Dec. 172. And where a deed of trust is made to secure bona fide debts, a purchaser of the trustee's title is protected by the statute of limitations, however fraudulent he may have acted in suppressing competition and even though he bought in the property for the trustor: *Taylor v. Dawson*, 56 N. C. 86. The fact that one purchases trust property with knowledge of the trust does not prevent the statute of limitations from running against the trustee and beneficiaries: *Ewing v. Shannahan*, 113 Mo. 188, 20 S. W. 1065. And where the right to enforce a resulting trust in land has been barred, the trust cannot be enforced against a subsequent purchaser of the land with notice of the claims of the beneficiaries of the trust: *Way v. Hooton*, 156 Pa. St. 8, 26 Atl. 784.

E. Sheriff or Attorney Collecting Moneys.—A deputy sheriff sued for official acts may plead any statutes of limitation which would be applicable to an action against the sheriff for the same acts: *Cumming v. Brown*, 43 N. Y. 514. An attorney may plead the statute of limitations to an action brought against him by a client for moneys collected but not paid over: *Kimbrow v. Waller*, 21 Ala. 376; *Stafford v. Richardson*, 15 Wend. 302; *Downey v. Garard*, 24 Pa. St. 52; *Cook v. Rives*, 13 Smedes & M. 328, 53 Am. Dec. 88; *Kinney v. McClure*, 1 Rand. 284.

3. Church Officials or Trustees.—Statutes of limitation bar the vestry and wardens of a church as well as any other person: *Vestry etc. v. Cantry*, 3 McCord (S. C.), 317. In *Dees v. Moss St. Baptist Church (Miss.)*, 17 South. 1, a church organization was allowed to plead the statute of limitation in a suit for moneys advanced to build its edifice, by one who for more than fifteen years had forborne to make any demand for repayment although during that time he was the trustee of the legal title to the property, but not being in possession in the execution of an active trust.

4. Creditors Suing on Behalf of Themselves or Other Creditors.—As a general rule, it may be said that a creditor seeking to enforce

a trust in favor of his debtor stands in the shoes of his debtor and will be barred if the debtor is also barred: *Buckler v. Rogers* (Ky.), 54 S. W. 848.

Hence where creditors suing on behalf of a corporation seek to enforce a cause of action upon which it might have sued, the creditors will be barred if the corporation would have been barred: *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918; *Lexington Life etc. Co. v. Page*, 17 B. Mon. 412, 66 Am. Dec. 165. An apparent exception was made to this rule in *McGinnis v. Barnes*, 23 Mo. App. 413, where it was held that a creditor of a corporation may have a subsisting cause of action against a stockholder for unpaid stock, although the corporation would have been barred by limitations from enforcing the liability in a direct proceeding. The decision seems to have been based on the theory that the capital stock is a trust fund for the benefit of the creditors of the corporation. A contrary conclusion was announced in *South Carolina Mfg. Co. v. Bank*, 6 Rich. Eq. (S. C.) 227.

Thus we see that generally a creditor, though he may be injuriously affected by his debtor's failure to set up limitations against another creditor's claim, cannot compel the debtor to set it up or set it up himself: *Welton v. Boggs*, 45 W. Va. 620, 72 Am. St. Rep. 833, 32 S. E. 232; *Anderson v. McNeal*, 82 Miss. 542, 34 South. 1. In accordance with this rule it was held in *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930, that a mere creditor who has no lien cannot avail himself of the fact that the debt of his debtor to a third person was barred at the time when the debtor gave the third person a deed of trust to secure the debt. And in *Re Sheppard's Estate*, 180 Pa. St. 61, 36 Atl. 422, the failure to set up defense of limitations to an honest claim was held not available as a ground of contesting the judgment, confessed by the debtor by persons who had a prior attachment even though by reason of such judgment the fund attached would yield them a smaller dividend. The fund in controversy was the debtor's interest in an estate. But in *Sawyer v. Sawyer*, 74 Me. 579, it was held where a subsequent attaching creditor had obtained leave of court to defend the suit of a prior attaching creditor that he might set up the statute of limitation as a ground of defense.

In *Durnford v. Clark's Estate*, 3 La. 199, it was held that an ordinary creditor could not plead prescription for his debtor if his estate be solvent, but that a mortgage creditor could, as to any other creditor whose claim on the property mortgaged clashed with his own. But it was also held under the Civil Code provisions that where any creditor had an interest that prescription should be acquired by the debtor, such as being a judgment creditor, that he might plead limitations: *Succession of McGill*, 6 La. Ann. 327; *Viala v. Burguières*, 19 La. Ann. 149.

The general rule heretofore stated does not seem to obtain where the proceeding initiated by the creditor is in the nature of a creditor's suit to subject the assets of the debtor to a pro rata payment of all his debts. Thus if the funds of the estate of a deceased person are not sufficient to pay all of its creditors, each creditor has a right to oppose any other claimant by showing that his claim is barred by limitations, and the executor cannot bar the creditor's right to plead limitations under such circumstances by refusing to plead it: *Estate of Claghorn*, 181 Pa. St. 600, 59 Am. St. Rep. 680, 37 Atl. 918. See, also, *Smith v. Pattie*, 81 Va. 666, *Fenner v. Manchester*, 6 R. I. 140, and *Mason v. Taft*, 23 R. I. 388, 50 Atl. 648, to the same effect. The court in *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419, in speaking on this subject, said: "The defense is generally a personal privilege and may be asserted or waived by a defendant at his election: *Clayton v. Henley*, 32 Gratt. 72; *Smith v. Hutchinson*, 78 Va. 683. Where, however, a court of equity has taken possession of the estate of the debtor for the purpose of distribution, and proceeded to ascertain the debts and encumbrances to enable it to properly administer and distribute the assets, an exception to the general rule is allowed, and any creditor interested in the fund is permitted to interpose the defense of the statute of limitations: *Story's Equity Jurisprudence*, sec. 548; 1 *Barton's Chancery Practice*, 85; *Shewen v. Vanderhorst*, 1 Russ. & M. 347; *Owens v. Dickenson*, 1 Craig & P. 56; *Tazewells v. Whittle*, 13 Gratt. 354; *Woodyard v. Polesley*, 14 W. Va. 211; *Werdenbaugh v. Reed*, 20 W. Va. 588; *Post v. Mackall*, 3 Bland, 498; *Partridge v. Mitchell*, 3 Edw. Ch. 180; *Grattan v. Wiggins*, 23 Cal. 25."

So, also, in suits brought for the liquidation and settlement of an insolvent partnership, the fund being insufficient to pay all the debts and the contest being wholly between the creditors, the partners not appearing in the action, one creditor may plead limitations against the claim of another creditor: *Conrad v. Buck*, 21 W. Va. 396.

5. **Principals and Sureties.**—Where the statute of limitations has run against the principal, the surety may also plead the statute: *Anchampaugh v. Schmidt*, 70 Iowa, 644, 59 Am. Rep. 459, 27 N. W. 805. Hence, on the other hand, where, because of the fraud of a principal in concealing his misappropriation of money, limitations have not run against him, it seems that the surety on his bond cannot plead the statute: *McMullen v. Winfield Bldg. etc. Assn.*, 64 Kan. 298, 91 Am. St. Rep. 236, 67 Pac. 892; *Eising v. Andrews*, 66 Conn. 58, 50 Am. St. Rep. 75, 33 Atl. 585. But the absence of the principal debtor from the state will not suspend limitations in favor of the surety: *Mozingo v. Ross*, 150 Ind. 688, 50 N. E. 867, 65 Am. St. Rep. 387, 41 L. R. A. 612.

Where a surety on a note assured the payee that it was "all right" as long as the principal kept up the interest on the note, the

surety cannot plead limitations where the period has not run as to the maker of the note: *Granville v. Young*, 85 Ill. App. 167. But see *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep. 663, as tending to support a contrary view.

It seems that the principal may plead limitations in bar of assumpsit by the surety to recover money paid by the surety by reason of the bond: *Penniman v. Vinton*, 4 Mass. 276. But the fact that a surety on a note has never been sued on it, and that more than six years has elapsed since its maturity, does not discharge him from liability to a cosurety for contribution: *Preslar v. Stallworth*, 37 Ala. 402. In this general connection see also following paragraph.

6. **Persons Entitled to Subrogation.**—Equity will not, it seems, suspend the statute of limitations in favor of one who seeks to enforce his right of subrogation to a vendor's lien. An action to enforce such a right must be brought within the statutory period: *Darrow v. Summerhill*, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680. In this connection see, also, *Zuellig v. Hemerlie*, 60 Ohio St. 27, 71 Am. St. Rep. 707, 53 N. E. 447.

A surety of a public officer who has paid the state its claim against his principal is entitled to the benefit of every right, lien and security which existed in favor of the state with reference to the claim against the principal, including, it seems, the state's exemption from the statutes of limitation: *American Bonding Co. v. National Mechanics' Bank*, 97 Md. 598, 99 Am. St. Rep. 466, 55 Atl. 395. For a further discussion of the right of a surety to subrogation, see, also, the preceding paragraph.

7. **Partners and Their Creditors.**—In *Jenny v. Perkins*, 17 Mich. 28, it was held that limitations could be pleaded to a bill for an accounting between partners. And no admissions or payments of interest on a note, made by one partner after dissolution of the partnership, will take the note out of the statute of limitations as to the other partner: *Terry v. Platt*, 1 Penne. (Del.) 185, 40 Atl. 243.

The representatives of a deceased partner cannot set up limitations against the creditors of the firm as long as the surviving partners continue liable for the debt or has the right to seek contribution from the estate of the deceased partner: *Buckingham v. Ludlum*, 37 N. J. Eq. 137. But where an action is barred as against the surviving partner it is also barred as against the administrator of a deceased partner: *McNaught v. Bostick*, 71 Ga. 782. And where, on the death of a partner, one of the surviving partners acts as executor of the deceased partner, the statute of limitations does not run against claims owing by him to the estate of the deceased partner: *Juilliard v. Orem*, 70 Md. 465, 17 Atl. 333. Of course, with reference to cases where suit is by or against the legal representatives of a deceased person, the statutes of the state must be consulted. Thus it was held in *Willis v. Sutton*, 116 Ga. 283, 42 S. E. 526, when a partnership is

dissolved by the death of one of the partners, limitations run in favor of his estate, after the expiration of twelve months from the grant of administration thereon, as to all demands of the surviving partner arising from partnership transactions.

8. *Garnishees*.—Inasmuch as the plea of limitations is generally considered a personal privilege of the debtor, it seems that the garnishee cannot set up the plea of limitations on behalf of the debtor: *Baltimore etc. Co. v. Vanderwerker*, 44 W. Va. 229, 28 S. E. 829. But he may plead the statute of limitations as to the debt which it is alleged that he owes the principal debtor: *James v. Fellowes*, 20 La. Ann. 116; *Hazen v. Emerson*, 9 Pick. 144; *Benton v. Lindell*, 10 Mo. 557; *Chapman v. Gale*, 32 N. H. 141; *Hinkle v. Currin*, 2 Humph. (Tenn.) 137.

9. *Receivers and Assignees for Benefit of Creditors*.—The statute of limitations applies to a contract made by a receiver in the same manner as though the contract was made in his individual capacity: *Nash v. Ingalls*, 101 Fed. 645. In this connection see, also, *Kirkpatrick v. McElroy*, 41 N. J. Eq. 555, 7 Atl. 647, and *Memphis etc. R. Co. v. Hoechner*, 67 Fed. 456. Some confusion has arisen in the application of statutes of limitation with reference to claims which arose prior to the appointment of the receiver on account of the peculiar character of a receiver with reference to his title to the property and his relation to the court. In *Ludington v. Thompson*, 153 N. Y. 499, 47 N. E. 903, it was held that the receiver of a voluntarily dissolved corporation is, under the New York statutes, a trustee appointed by the court for the administration of the property of the corporation for the benefit of all of its creditors, and it was held that the statute of limitations did not run in his favor as against claims not barred at the time of his appointment so long as the trust is open and continuing, and has not been repudiated or denied. But see *Quincy etc. R. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. Rep. 787, 36 L. ed. 632, to the effect that receivers are mere ministerial officers appointed by the court to take possession of and preserve *pendente lite* the fund or property in litigation.

With respect to an assignee for the benefit of creditors it has been held that he is a trustee and cannot plead the statute of limitations against creditors who are *cestuis que trust* and who are interested as owners of the assigned estate: *In re Passmore's Estate*, 194 Pa. St. 632, 45 Atl. 417.

10. *Executors and Administrators*.—Inasmuch as the executor or administrator is, in law, the personal representative or substitute, of the deceased, he naturally can prosecute or defend such suits as survive the death of the decedent in the same manner as the decedent could have done if living: See *Morris v. Murphy*, 95 Ga. 307, 51 m. St. Rep. 81, 22 S. E. 635; *Richardson v. Donehoo*, 16 W. Va. 5; monographic note to *Fletcher v. American Trust etc. Co.*, 78 N. St. Rep. 171.

It seems that in England, at common law, an executor had full power to plead the statute of limitations or not, at his pleasure. But the common-law rule as it existed in England has not been universally followed in this country, and in some jurisdictions the right to waive the statute has been denied. As a general rule, a distinction is observed between general statutes of limitation and special statutes of limitation which require creditors to present their claims against the estate within a certain specified time. For a full discussion of the subject, see the monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 188.

Statutes of limitation apply to suits by the administrator of creditors as well as to suits by the original creditor: *Perkins v. Moss*, 3 Heisk. (Tenn.) 671. And it is said that the statute of limitations is not necessarily a bar to an allowance of the balance due executors for payments made on account of the estate which he administered: *Munroe v. Holmes*, 13 Allen, 109. But the right of an administrator to maintain ejectment for use of the heirs is lost when the right of the heir is also barred by limitations: *McFarland v. Stone*, 17 Vt. 165, 44 Am. Dec. 325. And where a person during his lifetime, as executor, stands in relation of trustee to a fund and cannot plead the statute of limitations, his representatives, after his death, cannot plead it: *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897. And in accordance with the principles just stated, it was held in *Murdock v. Mitchell*, 30 Ga. 74, 76 Am. Dec. 634, that a court of equity would enjoin an action of ejectment by an administrator against a person holding adversely after the death of the intestate, where the bar of limitations had attached before the commencement of the suit or the grant of administration, there being no debts of the estate nor distribution necessary, and therefore no excuse for not applying for administration in proper time, or commencing suit if administration was unnecessary.

11. Parties Plaintiff or Defendant.

A. In General.—A plaintiff as well as a defendant may plead the statutes of limitation. Of course, the statutes of limitation are generally used as a shield, but where plaintiff's title has become perfected under a statute of limitations so that it cannot be questioned in a suit brought against the plaintiff, the plaintiff naturally can obtain the same benefit of the statute in a suit brought by him: *Watkins v. Dorsett*, 1 Bland, 530; *Toll v. Wright*, 37 Mich. 93. And, of course, the plaintiff is entitled to plead limitations to set off or counterclaim under proper circumstances: *Peden v. Cavins*, 134 Ind. 494, 39 Am. St. Rep. 276, 34 N. E. 7. See, also, note to *Beecher v. Baldwin*, 3 Am. St. Rep. 63, 64.

B. Joint Plaintiffs or Defendants.—Some confusion appears to exist among the authorities as to the right to plead the statute of limitations where the suit is commenced by or against joint plain-

tiffs or joint defendants, and some of the parties joined in the proceeding appear to have been barred while others appear to have been saved by reason of some disability or otherwise. With respect to the effect of the disability of a cotenant in a joint action, it is stated in Freeman on Cotenancy, section 375: "A preponderance of the authorities, we think, sustains the general proposition that whenever a joint cause of action exists, and the statute of limitations is a bar to any of the plaintiffs, it is a bar to all. 'It is now well settled that where several persons are entitled to an action in order to avoid the effect of the statute of limitations, the whole of them must labor under the same disability.' 'It seems to be a well-settled rule that all the plaintiffs in a suit must be competent to sue, otherwise the action cannot be supported. When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action.' 'Whenever the statute of limitations is a bar to the recovery of one of the parties in such action, it operates against the whole, because the disability of one does not save the right of the others. The statute protects the rights of those who are incompetent to protect themselves; but where some of the parties are competent, they ought to take care of the interests of all, by prosecuting the suit within time.' In this respect, the common is in striking contrast with the civil law." And continuing, it is said: "There are also quite a number of decisions to the effect that where several parties to an action are required, within a specified time, to jointly prosecute some proceeding to obtain a review of a judgment or decree, and one of these parties is exempted from this requirement on account of certain disabilities, then all are so exempted. The authorities thus opposed to one another are all based upon the assumption that a joint right or a joint cause of action cannot be severed. Reasoning from this assumption different courts have attained diametrically opposite conclusions. On one hand it is said that because the action is necessarily joint, it must follow that whenever the statute extinguishes the cause of action as to one cotenant it extinguishes it as to all. On the other hand, it is said, with equal force, that whenever a cause of action is necessarily joint, it must follow that the keeping of such cause alive as to one cotenant is keeping it alive as to all. And as considerations of inconvenience and hardship are apt to prevail over those general rules by which all systems of jurisprudence ought to be distinguished, it is natural that we should find decisions which, though emanating from courts professedly engaged in administering the common law, are totally irreconcilable with both the theories referred to in this section. These decisions are attempts to obtain a middle ground which shall be free on the one side from the manifest hardship of involving the minors in a common ruin with the majors, and, on the other side, of the equal justice of conceding to the majors the peculiar advantages intended only for the minors."

Of course, it must be observed that some decisions which allow all of the joint parties the benefit of the disability of one are based upon the peculiar phraseology of the statute of limitations under consideration. The case of *Shute v. Wade*, 5 Yerg. 2, illustrates such an instance. In this connection see, also, *Masters v. Dunn*, 30 Miss. 268; *Herron v. Marshall*, 5 Humph. 443, 42 Am. Dec. 444; *Wells v. Raglan*, 1 Swan, 501; *Jones v. Henry*, 3 Litt. 48; *Riggs v. Dooley*, 7 B. Mon. 240; *Clay v. Miller*, 3 T. B. Mon. 146; *Seay v. Bacon*, 4 Sneed, 102, 67 Am. Dec. 601.

With respect to the joinder of a cotenant barred by the statutes, it is said in *Freeman on Cotenancy*, section 378: "While the state of the authorities is such as to admit of grave doubt as to whether in case of joint actions the disability of one cotenant operates for the benefit of all, or whether the want of disability in one operates to the detriment of all, yet this seems certain that, in the absence of peculiar statutory provisions, whenever the rights of cotenants may be secured by separate actions and adequate means of redress are therefore within the reach of each, a cotenant not under any disability cannot avail himself of the disability of any of his cotenants. But the cause of action or the nature of the cotenancy may be such that the cotenants could have either joined or severed in the prosecution of their remedies. In such case, while it is generally and, we believe, universally, conceded that the cotenants not under disability shall not derive any benefit from the disability of the minor cotenants, more doubt must be felt, after an examination of the authorities, upon the question whether, if a joint action be brought, a judgment may be entered against those barred by the statute and in favor of those against whom the statute has not run. But we think that a considerable majority of the authorities upon this question assert that, by electing to participate in a joint action, the plaintiff not barred by the statute has involved himself in a common fate with his coplaintiffs; and, therefore, that a judgment must be entered against all. But in Tennessee, upon a joint demise by tenants in common, although some of them are barred by the statute, the others may recover judgment for their moieties. In Vermont an administrator brought an action of ejectment for the benefit of several heirs. It appeared that some of these heirs were barred by the statute and others were not. And, thereupon, the court said that 'as this is not a case of joint tenancy—in which all must join in bringing suit—the rights of some may be barred and not those of others; as some might have conveyed their interests by deed or be barred by estoppel; so also by the statute of limitations.'"

In a late case in Alabama, that of *Love v. Butler*, 129 Ala. 531, 30 South. 735, which was a bill in equity by several complainants for an interest in certain real property devised to them, the court said: "The bill shows that all the complainants except William L. Butler, were minors at the date of the death of the testator, which occurred

at least twenty years before it was filed, and it may be, twenty-one years before its filing, and all of them were adults at the date of its filing. It may be that it cannot be affirmed that all the minors had passed the age of twenty-four years at the date of the filing of the bill, but as they are joined as complainants with William L. Butler, whom the bill shows is barred, they cannot recover: *Richter v. Noll*, 123 Ala. 198, 30 South. 740; *Lovelace v. Hutchinson*, 106 Ala. 418, 17 South. 623." As tending to support the same conclusion arrived at by the court in the foregoing case, see *Hunt v. Ellison*, 32 Ala. 173, *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621, 32 South. 278, *Saunders v. Saunders*, 49 Miss. 327, where the question was over the prosecution of a writ of error by several defendants, some of whom were laboring under disability; *Keeton v. Keeton*, 20 Mo. 530.

For a further discussion of this branch of the subject, see subdivision IV, c, where the question with reference to tenants in common and joint tenants will be again adverted to.

12. Discharged Insolvent Debtors.—In *Denny v. Henderson*, 2 Cranch C. C. 121, Fed. Cas. No. 3806, it was held that the statute of limitations runs in favor of an insolvent debtor, notwithstanding his discharge under the insolvent act. In *Wilson v. Ramsay*, 1 Nott & McC. (S. C.) 109, it was held that a defendant who had taken the benefit of the insolvent debtor's act could plead the statute of limitations where the statute had run before the making of the petitions. But see *Sinclair v. Lynch*, 1 Spear, 244, where the right to so plead was denied where the demand existed at the time of his discharge.

c. As Dependent upon the Interest or Estate of the Parties in Property.

1. Owner of Land Entitled to Sue.—Where a person has such an interest in land as would entitle him to maintain trespass to try title, the statute of limitations will run against him in favor of an adverse holder: *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026. So, also, the statute of limitations runs against him who could sue in ejectment and not against the equitable owner who could not sue: *Ferguson v. Kennedy*, Peck (Tenn), 321, 14 Am. Dec. 761.

2. Joint Tenants and Tenants in Common.—In subdivision IV, b, 11, in discussing the right to plead limitation as dependent upon the question whether the recovery or defense was based on the parties being joint plaintiffs or defendants, we necessarily adverted to the principles of law which affect persons who occupy the relation of joint tenants or tenants in common with reference to the property or rights in controversy.

Inasmuch as the substantive law with respect to tenancy in common, joint tenancy and tenancy by the entireties is quite technical and often not thoroughly understood, the use of loose expressions by

the courts when dealing with the subject of limitations in connection with such tenancies has given rise to some apparent confusion amongst the authorities.

With respect to the rule applicable where the litigants on one side or the other are joint tenants, see the discussion with reference to joint plaintiffs and defendants in subdivision IV, b, 11. The question most frequently arises where one of the joint tenants has been under a disability. Thus, it was held in *Robertson v. Smith*, Litt. Cas. 296, 12 Am. Dec. 304, that where one of several joint tenants is under no disability, the statute of limitations will run against them all. And in *Keeton v. Keeton*, 20 Mo. 530, it was said that if two tenants unite in a joint demise, the disability of one of the joint tenants does not aid the others; that if one is barred, all are barred. By making a separate demise and suing for his own interest he who has been under a disability may recover his share, but if he sues jointly with others who are barred by the statute, he will not be protected. So, also, in *Floyd v. Johnson*, 2 Litt. 109, 13 Am. Dec. 255, it was said that joint tenants, in order to claim the benefit of the statute of limitations, must all have been under some disability at the time their right accrued. In *Sanford v. Button*, 4 Day, 310, the court observed: "There can be no question but the rule of the common law on a joint suit is, that the minority of one will save the rights of those of full age; for the recovery must be joint and no one without the other can recover. And as the rights of the minor are secured, he must recover; and yet, he cannot recover, but with all the joint proprietors of course they must recover also." The court then adverted to the rights which obtain as to tenants in common, and then observed: "By our practice which has been long since settled, from which no inconvenience has arisen, any one joint tenant or coparcener may sue and recover without joining any others. Why, then, do they not assert their claims seasonably? There is nothing to prevent them. And why should they avail themselves of the privilege of others? No reason can be assigned why they should. On this record it does not appear but that all the plaintiffs except Lydia were persons who did not labor under any disability, and might have asserted their claims at any time. They can, therefore, never have a right to recover; and Lydia cannot recover in a suit where she has joined those who have no right to recover. The suit being joint, the judgment must be joint also."

Practically, the same conclusion was announced in *Barrow v. Navee*, 2 Yerg. 227, though the decision appears to have been controlled by the phraseology of the local statute of limitation.

With respect to cotenants the general rule is stated as follows: "The statute of limitations operates upon causes of action existing in favor of one cotenant and against another, to the same extent that it operates in actions between persons not within the relation of cotenancy. The only peculiar difficulty in the application of the

statute to actions between cotenants is in determining at what period it began to run. This difficulty arises only in actions growing out of the cotenancy; for if the suit be based upon some cause of action disconnected from the cotenancy, the accidental circumstance that the parties are cotenants neither affects the cause of action nor the operation of the statute thereon': Freeman on Cotenancy, sec. 373.

The same rules that obtain with respect to tenancy in common of realty appear to prevail with respect to chattels. Thus, it was held in *Saunders v. Gattin*, 21 N. C. 86, that the claim of one tenant in common of a chattel against his cotenant for the destruction of the chattel was within the operation of the statute of limitations. As shown before, the statute of limitations does not run as between tenants in common unless there has been an actual ouster and adverse possession by one of them: *Holley v. Hawley*, 39 Vt. 525, 94 Am. Dec. 350; *Nave v. Smith*, 95 Mo. 596, 6 Am. St. Rep. 79, 8 S. W. 796. But where there has been an adverse possession of more than fifteen years against two tenants in common, and one of them is within the saving of the statute of limitations, the right of the other is not thereby saved: *Doolittle v. Blakesley*, 4 Day, 265, 4 Am. Dec. 218. See, also, *McFarland v. Stone*, 17 Vt. 165, 44 Am. Dec. 325; *Wade v. Johnson*, 5 Humph. 117, 42 Am. Dec. 422, to the same effect.

Where one cotenant holds possession to the exclusion of the others, claiming to own the whole and holding it adversely to the other cotenants, an action for partition by a cotenant may become barred by limitations, but when cotenants own land and none of them hold adversely to the others, the right of any cotenant to demand partition will not become barred by limitations: *Peden v. Cavins*, 134 Ind. 494, 39 Am. St. Rep. 276, 34 N. E. 7. In the recent case of *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712, it was held that the statute of limitations never bars relief in an action for partition as between tenants in common; and that it is only where a party has by operation of the statute of limitations lost all right to the land, and such right has by prescription become vested in another, that the statute of limitations applies in such an action, but that it may be resorted to in such actions to establish an interest in the property. But it seems that the statute of limitations is applicable to a claim for an accounting for the rents and profits of land by one tenant in common against a cotenant in possession: *Wagstaff v. Smith*, 39 N. C. 1.

3. Tenants in Tail and Tenants by the Curtesy.—An equitable estate tail may be barred in the same manner as an estate at law: *Croxall v. Shererd*, 5 Wall. 268, 18 L. ed. 572. And if the statute of limitations has once run against a tenant in tail, it is a complete bar to a subsequent tenant in tail upon a descent cast: *Inman v. Innes*, 2 Gall. 315, Fed. Cas. No. 7048.

The fact that a tenant by the curtesy is guardian of his minor son, entitled to the remainder, does not cause the statute of

limitations to run against their right of action for waste: *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621, 32 South. 278.

4. **Remaindermen and Reversioners.**—Statutes of limitation do not commence to run against a remainderman until the termination of the intermediate estate: *Bozeman v. Browning*, 31 Ark. 364; *Shumate v. Snyder*, 140 Mo. 77, 41 S. W. 781; *Kesterson v. Bailey* (Tex. Civ.), 80 S. W. 97.

So, also, with respect to a reversioner, it is held that the statute of limitations does not begin to run against him until the expiration of the intermediate estate: *Dickinson v. Griggsville Nat. Bank*, 111 Ill. App. 183. See, also, *Ousler v. Robinson* (Ark.), 80 S. W. 227. And it is said that the possession of the tenant for life cannot be adverse to the rights of the reversioner: *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796.

5. Mortgages and Mortgagees.

A. **In General.**—While the relation of mortgagor and mortgagee continues, neither party in possession can interpose the statute of limitations as a defense against the other: *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762. And it is said that as against subsequent encumbrancers or a subsequent holder of the equity of redemption, the mortgagor has no power by stipulation to prolong the time of payment or increase the burdens on the mortgaged premises, but it is otherwise where he retains the equity of redemption: *Wood v. Goodfellow*, 43 Cal. 185; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765. There is some conflict among the authorities as to whether the mortgagor can plead the statute of limitations to a suit to foreclose the mortgage where the debt upon which the mortgage is based is barred. The subject is exhaustively treated in the monographic note to *Wenzel v. Hinton*, 95 Am. St. Rep. 664, where the theories upon which the conflicting rules and the authorities pro and con are collected and commented upon. The rule, with respect to trust deeds and chattel mortgages, is likewise discussed in the monographic note just mentioned.

One of the theories upon which the conflicting line of decisions rests is that a mortgagee has two remedies, one upon the bond or other evidence of the indebtedness, and the other by a suit upon the mortgage. Consequently, it is held by some of the authorities that the operation of the statute of limitations against one of these remedies does not necessarily affect the other: *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728. It is held that the plaintiff, in an action to quiet title, may interpose the bar of limitations against a defendant mortgagee who is seeking to foreclose his mortgage lien in the same action: *Hogaboom v. Flower*, 67 Kan. 41, 72 Pac. 547.

B. **Junior Mortgagees.**—It seems that a junior mortgagee may avail himself of the statute of limitations in a suit to foreclose the

senior mortgage, even though the mortgagor declines to plead the statute: *Scott v. Sloan*, 3 Tex. Civ. 302, 23 S. W. 42; *Hill v. Hilliard*, 103 N. C. 34, 9 S. E. 639. In *Lord v. Morris*, 18 Cal. 482, it was held where a note is secured by mortgage upon real property, and subsequently, after the remedy on the note is barred, the mortgagor executes a second mortgage to a third party, such third party can interpose limitations to the foreclosure of the first mortgage, even though the mortgagor had, after the execution of the second mortgage, and after the barring of the note to the first mortgage, indorsed on said note that he renewed, revived and agreed to pay the same. The decision may, however, have been controlled to some extent by reason of a statute of limitations different from that obtaining in most of the states at that time and in different theory as to the character of mortgages. In *Sawyer v. Nightingale*, 122 U. S. 185, 17 Sup. Ct. Rep. 1109, 30 L. ed. 1105, in a suit by a junior mortgagee to foreclose his own mortgage, the junior mortgagee sought to set up the statute of limitations, not as a defense, but as a positive weapon to set aside and annul the decree of a court of competent jurisdiction, with proper parties before it, which foreclosed a mortgage prior in time and equal in equity to his, under which foreclosure the property was sold and passed into other hands. The court held that he could plead limitations. And in *Tinsley v. Lombard (Or.)*, 78 Pac. 895, it was held where a senior mortgagee sued to foreclose and joined a junior mortgagee as a party, and the latter did not contest plaintiff's claim nor right of priority, but filed a cross-complaint for foreclosure of his mortgage as a subsequent lien, there was no such privity between plaintiff and the junior mortgagee as would entitle the plaintiff to plead the statute of limitations as against the junior mortgagee.

6. **Persons Entitled to Redeem from Mortgage Sales.**—It is stated that the right to foreclose a mortgage and the right to redeem therefrom are reciprocal, and hence, that where one is barred the other is also barred: *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650; *Cassee v. Heustes*, 201 Ill. 208, 94 Am. St. Rep. 160, 66 N. E. 283. See, also, *Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73; *Holton v. Meighen*, 15 Minn. (Gil. 50), 69; *King v. Meighen*, 20 Minn. (Gil. 237) 264. In *Green v. Capps*, 142 Ill. 286, 31 N. E. 597, the court said: "Appellant concedes that the deed, regarded as a mortgage, could not have been foreclosed when this bill was filed, because the indebtedness it was given to secure was then barred by the statute of limitations. But if the statute of limitations then barred a foreclosure, it, for the same reason, barred a redemption from the deed, regarded as a mortgage, for the right to redeem and the right to foreclose are reciprocal, and where one is barred the other is barred."

7. **Holder of Void Tax Title.**—It seems that the statute of limitations cannot be invoked by the holder of a void tax deed: *Hurd v.*

Brisner, 3 Wash. 1, 28 Am. St. Rep. 17, 28 Pac. 371, and that a tax deed void on its face does not set in motion the statute of limitations especially applicable to tax sales. But it seems that under the general statute of limitations a void tax deed may constitute a color of title: *Bartlett v. Kander*, 97 Mo. 356, 11 S. W. 67. Hence, it was held in *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53, that a deed void on its face for uncertainty could not be relied on to support the plea of limitations under the five year statute of limitations, but that such a deed would constitute color of title under the ten year statute. So, also, in *Chicago etc. Ry. v. Allfree*, 64 Iowa, 500, 20 N. W. 779, a tax deed void because the land was not taxable, the title being in the United States, was held to constitute color of title in favor of which the statute of limitations may be invoked as against a purchaser from the United States: See note, "What Constitutes Color of Title Within Meaning of Law of Adverse Possession," attached to *Power v. Kitching*, 88 Am. St. Rep. 701, and particularly pages 726, 727 and 728, relating to tax deeds.

8. Persons Entitled to Liens.—If, in proceedings to enforce a mechanic's lien, a necessary party is made a party by amendment of the bill after the time for bringing suit has expired, he is the only person who can take advantage of the fact that he was not made a party to the bill within the time limited: *Cassery v. Wayne Circuit Judge*, 124 Mich. 157, 83 Am. St. Rep. 320, 82 N. W. 841. Under the California code the lien of a pledge as security for the indebtedness is extinguished by the lapse of time within which an action can be brought upon the principal obligation: *Mutual Life Ins. Co. v. Pacific Fruit Co.*, 142 Cal. 477, 76 Pac. 67. A vendor's lien for the payment of the purchase money of land is preserved and enforceable, although an action upon the note or debt is barred: *Hood v. Hammond*, 128 Ala. 569, 86 Am. St. Rep. 159, 30 South. 540. But that is not the universal rule: See the monographic note to *Menzel v. Hinton*, 95 Am. St. Rep. 662, where the subject of limitations in connection with various liens is exhaustively treated.

9. Persons Entitled to Distribution in Receivership Proceedings. Persons entitled to distribution of the proceeds of assets in the hands of a receiver, not being necessary parties to a proceeding against such receiver, to recover damages for personal injuries received by persons in his employ, on being made parties are not entitled to plead the statute of limitations where the action had been commenced against the receiver within the time limited: *Knickerbocker v. Benes*, 98 Ill. App. 305.

4. As Dependent upon the Mode of Acquisition of the Interest or Estate in Property.

1. Judgment Creditors and Their Assignees.—The holder of a judgment lien against mortgaged land can plead the statute of limita-

tions against the mortgage: *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836. In *Brandenstein v. Johnson*, 140 Cal. 29, 73 Pac. 744, a subsequent judgment lienholder interposed the plea of limitations as against a prior mortgage. The court, however, decreed foreclosure of the mortgage, but held that the mortgage lien was subject and junior to the judgment lien. In this general connection see, also, *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *California Bank v. Brooks*, 126 Cal. 198, 59 Pac. 302; *Filipini v. Trobock*, 134 Cal. 441, 66 Pac. 587.

But one of two assignees claiming the same judgment cannot plead the statute of limitations as against one another: *Clarke v. Hoggeman*, 13 W. Va. 718.

2. Assignees or Purchasers in General.

A. In General.—One who has acquired the rights of a vendor to his lien for the purchase money is protected by the statute of limitations in the same manner as the vendor would have been: *Rodman v. Sanders*, 44 Ark. 504. And one who participates in a breach of trust can no more than the trustee invoke the defense of limitations: *Duckett v. National Mechanics' Bank*, 86 Md. 400, 63 Am. St. Rep. 513, 38 Atl. 983, 39 L. ed. 84. So, also, the assignee of a note may plead the statute of limitations against a setoff based upon a claim against his assignor: *Walker v. Burgess*, 44 W. Va. 399, 67 Am. St. Rep. 775, 30 S. E. 99; *Thompson v. Sickles*, 46 Barb. 49. And where a bank accepts an assignment of all the assets and liabilities of another bank and credits on its own books the amount of a depositor's credit on the books of the assignor bank, the creditor becomes a depositor with the assignee so that his claim cannot become barred: *Green v. Odd Fellows' etc. Bank*, 65 Cal. 71, 2 Pac. 887.

B. Purchasers at Judicial Sales.—In the principal case (*Hopkins v. Clyde*, ante, p. 737) it was held that a purchaser at a judicial sale acquires the right and title of the judgment debtor in the real estate sold, and that therefore he may plead the statute of limitations in protection of such property if the judgment debtor could do so. Hence it is held that a purchaser under a decree made in partition is in such privity with the maker of a trust deed as to the property involved that he may plead limitations to foreclosure proceedings therein. But it was held in *Gibson v. Currier*, 83 Miss. 234, 102 Am. St. Rep. 442, 35 South. 315, that the defense of the two year statute of limitations could not be raised by a purchaser under a decree of court who made no actual payment, and that a sham payment or subterfuge would not be deemed sufficient to constitute a payment.

C. Purchasers at Private Sales.—It seems to be the general rule that the grantee of land is in such privity with his grantor that he may plead the statute of limitations with reference to the land conveyed to him if his grantor could have done so. Thus it has been quite frequently held that the grantor of the mortgagor may plead the statute of limitations to a foreclosure of the mortgage if the

statute would have been available to the mortgagor: *Grattan v. Wiggins*, 23 Cal. 16; *Hinkley v. Green*, 52 Ill. 223; *Brown v. Devine*, 61 Ill. 260; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765. In *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263, it was held that a subsequent grantee of mortgagor, not obligated to pay the debt, may plead limitations to an action to foreclose the mortgage, although the statute has not run against the mortgagor and maker of the note secured by the mortgage, by reason of his absence from the state. But it was held in *Denny v. Palmer*, 26 Wash. 469, 90 Am. St. Rep. 766, 67 Pac. 268, that though a mortgagor's absence from the state does not suspend the running of the statute as to the foreclosure of the mortgage against his grantee, still if the grantee has failed to record his deed, he is estopped to set up the statute in such foreclosure suit, brought within reasonable time after notice of grantee's right is received, where the statute has not run against mortgagor by reason of his absence from the state: See, also, *Spaulding v. Howard*, 121 Cal. 194, 53 Pac. 563, to the same general effect.

But in an action to reform a release of mortgage made by mistake, where the present owner of the premises is made a defendant but was not a party to the release, he cannot plead limitations, it being a personal privilege, especially where he had notice of the existence of the mortgage at the time he acquired his interest in the property: *Perry v. Williams*, 40 Misc. Rep. 57, 81 N. Y. Supp. 204. And where a corporation which had given a mortgage does not set up limitations to a suit to foreclose, limitations cannot be pleaded by one to whom the corporation has contracted to sell the property, but who has not been vested with either full equitable title or possession under the contract: *Hanchette v. Blair*, 100 Fed. 817.

And where the grantor and grantee of a deed were sued for the purpose of having the deed declared to be a mortgage and made subject to certain judgments against the grantor which plaintiff, being liable as surety, had paid, it was held that the grantee could not plead the limitations which the grantor could with respect to a suit by a surety against his principal: *Dunton v. McCook*, 93 Iowa, 258, 61 N. W. 977. But where a married woman against whom the statute of limitations does not run and who is a cotenant with her brother, purchases his share in the property, against which the statute has run, she takes his share subject to the defense of limitations: *McFarlane v. Grober*, 70 Ark. 371, 91 Am. St. Rep. 84, 69 S. W. 56. And it is also held that one who purchases property encumbered with a tax lien is deemed as to such taxes a delinquent taxpayer with the same rights which he had to plead limitations: *Mellinger v. Houston*, 68 Tex. 37, 3 S. W. 249.

And it is also held that the title of a grantee of property conveyed in fraud of creditors may plead the statute of limitations to a suit by creditors attacking his title: *Reeves v. Dougherty*, 7 Yerg. 222, 27 Am. Dec. 496; *McDowell v. Goldsmith*, 6 Md. 319, 61 Am. Dec. 305;

Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 94 Am. St. Rep. 709, 92 N. W. 340. But in an action to set aside a conveyance as fraudulent the defendant cannot plead the statute of limitations to the original cause of action of the creditor, who is seeking to set aside his conveyance: *Stoutz v. Huger*, 107 Ala. 248, 18 South. 126.

The grantee of an heir of one who is protected from the operation of the statute of limitations is entitled to the full benefit of that protection: *Ford v. Langel*, 4 Ohio St. 434, 62 Am. Dec. 295. But the creditors of an intestate have no such lien on his realty as that an action in their behalf will prevent the statute of limitations from becoming available in favor of a purchaser from the heirs of the intestate: *Nelson v. Trigg, & Lea* (Tenn.), 701.

D. Purchasers Pendente Lite.—The statutes of limitation do not run in favor of a purchaser pendente lite. He will not be regarded as holding adversely to the parties to a suit during the litigation: *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762.

3. Heirs, Devisees or Legatees.

A. In General.—In the principal case (*Hopkins v. Clyde*, ante, p. 737) it was held where an action to foreclose a mortgage seeks the sale of real estate which has vested in the widow and heirs of the mortgagor either by will or descent, they or either of them or the successor in interest of either, may plead the statute of limitation in protection of the estate from foreclosure and sale.

Of course, the statutes, as a general rule, have some provision in regard to suspending the running of the statute for a short period after the death of the ancestor in order to allow the heirs to have proper legal representatives appointed. Thus it was held in *Hasseldenz v. Dofflemyre* (Tex. Civ.), 45 S. W. 830, that where plaintiffs claim land as the heirs of their mother, who was a minor or married woman up to the time of her death, and no administration had been had on her estate, that limitations would begin to run twelve months after the mother's death. And in *Whiteside v. Catching*, 19 Mont. 394, 48 Pac. 747, it was said that the death of a judgment debtor would not suspend the operation of the statute of limitations, but that the time between his death and the granting of letters of administration would be excluded in computing the period of limitations. Hence the general rule is, that the death of the ancestor does not, in the absence of statutory provisions to the contrary, suspend the running of the statute against the obligation of the ancestor, and consequently the heir is entitled to plead limitations when the time necessary to constitute the bar has expired: *Loyd v. Loyd*, 20 Ky. Law Rep. 347, 46 S. W. 485; *Ferguson v. Browne*, 1 Bradf. Surr. 10; *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315; *Shamate v. Snyder*, 140 Mo. 77, 41 S. W. 781; *Mereness v. First Nat. Bank*, 113 Iowa, 11, 84 Am. St. Rep. 318, 83 N. W. 711, 51 L. R. A. 410; *Trustees*

of Kentucky etc. *School v. Fleming*, 10 Bush, 234; *Appeal of Amole*, 115 Pa. St. 356, 8 Atl. 614; *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744. And in *Baumeister v. Silver*, 98 Md. 418, 56 Atl. 825, it was held that the death of one holding the legal title of property, but out of possession, does not stop the running of limitations as against his interest therein. And in *Lide v. Park*, 135 Ala. 131, 93 Am. St. Rep. 17, 33 South. 175, it was held that the statute of limitations begins to run against the right of an heir to enforce a constructive trust in favor of his ancestor at the same time that it began to run against the ancestor.

So, also, where an administrator accounts fully for all assets without retaining anything for a debt due himself and has not procured a sale of lands to pay debt, the heirs and devisees may plead limitations in a subsequent action to subject lands to the payment of such debt: *Trimble v. Fariss*, 78 Ala. 200. And where the executor is residuary legatee of property charged with a debt, an action may be brought against him in his individual capacity on an implied promise to pay the debt from his acceptance of the bequest, even though the statute of limitations protects him as executor: *Fuller v. McEwen*, 17 Ohio St. 288. The heirs also may plead limitations against a judgment recovered on a debt renewed by the administrator after it was barred: *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15. And in a suit by an administrator against a distributee and her guardian for money paid over by mistake, the distributee may set up limitations, though the guardian neglects to plead it: *Massey v. Massey*, 2 Hill Eq. (S. C.) 492. An heir is entitled, as against creditors seeking to charge his real estate, to plead limitations unaffected by any act or admission of an executor: *Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740. But in *Brock v. Kirkpatrick*, 60 S. C. 322, 85 Am. St. Rep. 847, 38 S. E. 779, it was held that the statute of limitations does not run so as to protect a devisee in possession against his liability to pay the testator's debts until after the remedy has been exhausted against the executor.

Where a married woman was compelled to execute a deed by threats and to keep silent during her lifetime, her heirs are barred after two years from setting the conveyance aside, since the statute permits a person under disability to sue within two years after the removal of the disability: *Kennedy v. Warnica*, 136 Ind. 161, 36 N. E. 22. And where one was in actual adverse possession under color of title of land of a married woman for seven years before the death of her husband, and she failed to bring her action therefor within the three years after his death as required by the code, her heirs are also barred: *Swift v. Dixon*, 131 N. C. 42, 42 S. E. 458. In *Reed v. Painter*, 145 Mo. 341, 46 S. W. 1089, it was held under the Missouri statute that where the husband fraudulently took title to land belonging to his wife in his own name and she died during coverture, the right of her heirs to recover it was barred.

after three years from her death where they knew the facts constituting the cause of action previous to her death.

B. Minor Heirs.—Where an executor's or administrator's right to recover property of the estate is barred by the statute of limitations, the heir or devisee is also barred though the latter may be under disability of infancy at the time the action accrued to the legal representative: *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; *Jenkins v. Jensen*, 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773. The running of the statute of limitations against the right of action of a married woman is not interrupted by her death where her infant child takes only such right of action as she had: *Patton v. Dixon*, 105 Tenn. 97, 58 S. W. 299.

If the right of an administrator to sue is barred by limitations, the right of a posthumous heir represented by him and born after his appointment is also barred: *Jenkins v. Jensen*, 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773.

STATE v. FRENCH.

[71 Ohio St. 186, 73 N. E. 216.]

CONSTITUTIONAL LAW—Statutes Authorizing Destruction of Certain Nets Used in Fishing.—A statute declaring any net or any other means or device for catching or capturing fish in violation of the law for their protection to be a public nuisance and making it the duty of certain public officers to destroy such nets and devices, is constitutional. (p. 773.)

Action brought against the state of Ohio for the destruction of certain nets as authorized by the statutes of that state for the year 1898, which, so far as material, read as follows: "Any net or any other means or device whatever for taking or capturing fish, or whereby they may be taken or captured, located, set, put, floated, had, found or maintained, in or upon any of the waters or streams of this state, or upon any boat engaged in fishing in any waters of this state, in violation of any law enacted for the protection of fish, is hereby declared to be, and is, a public nuisance, and may be abated and summarily destroyed by any person. And it shall be the duty of every game warden, deputy game warden, sheriff, constable or other police officer to seize and remove and forthwith destroy the same; and no action for damages shall lie or be maintained against any person for or on account of any such seizure or destruction."

The present action was brought under a statute enacted in 1898, authorizing any resident whose nets had been destroyed

under authority of the act of 1898 to recover therefor of the state, should the latter statute be declared unconstitutional, either under the constitution of the state or of the United States.

The trial court held the statute of 1898 to be unconstitutional, and the plaintiff French therefore had judgment in his favor, which was by the circuit court affirmed.

Wade H. Ellis, attorney general, and J. M. Sheets, for the plaintiff in error.

George A. True, for the defendant in error.

²⁰⁰ SUMMERS, J. That part of the act of 1898 above quoted is copied almost literally from the act of the legislature of New York, and, but that it is thought proper to point out the difference between the statute under consideration and the statute passed upon in *Edson v. Crangle*, 62 Ohio St. 49, 56 N. E. 647, its validity might be rested, without more, upon the authority of *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385.

In the case in the supreme court of the United States it is decided: "It is within the power of a state to preserve from extinction fisheries in waters within its jurisdiction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish.

"The provision in the statutes of New York, chapter 591 of the Laws of 1880, as amended by chapter 317 of the Laws of 1883, that nets set or maintained upon waters of the state, or on the shores of our islands in such waters, in violation of the statute of the state enacted for the protection of fish, may be summarily destroyed by any person, and that it shall be the duty of certain officers to abate, remove and forthwith destroy them, and that no action for damage shall lie or be maintained against any person for or on account of such seizure or destruction, is a lawful ²⁰¹ exercise of the police power of the state, and does not deprive the citizen of his property without due process of law, in violation of the provision of the constitution of the United States."

This disposes of the contention that the act violates the constitution of the United States on the ground that it deprives a citizen of his property without due process of law; and also of the same contention respecting the constitution of Ohio, ur-

less there is a difference, and there is not (Cooley's Constitutional Limitations, 47, 431) in the two instruments respecting due process of law.

What is said in *Railroad Co. v. Keith*, 67 Ohio St. 279, 65 N. E. 1020, to the effect that the provision of our Bill of Rights respecting due course of law was adopted to get rid of the imperfections and injustice of the common law, seems to have been said inadvertently. In *Weimer v. Bunbury*, 30 Mich. 201, Cooley, J., says: "The truth is that bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory."

And in *Lawton v. Steele*, 119 N. Y. 226, 237, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134, Andrews, J., says: "These authorities sufficiently establish the proposition that the constitutional guaranty does not take away the common-law right of abatement of nuisances by summary proceedings, without judicial trial or process." Again, on page 238 of 119 N. Y., 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134, he says: "But as the legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct its summary abatement by executive officers, without the intervention of judicial proceedings, in cases analogous to those where ~~the~~ the remedy by summary abatement existed at common law."

The criticism of the opinion in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385, that it upholds a statute admittedly violative of the constitution by applying the maxim, "*De minimis non curat lex*," is, it seems to me, based entirely upon a misconception. The learned justice says the constitutionality of the legislation was sustained by the court of appeals of New York upon the ground of its being a lawful exercise of the police power of the state, and speaking of the exercise of the power, he says: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals"; and having shown that the preservation of game and fish is within the police power he proceeds to consider whether the act, in that it provided that nets used in violation of its provisions are public nuisances and may be summarily

destroyed by any person, will bear the test of the second rule, namely, "that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." In the determination of that question the value of the property was a very proper matter for consideration.

In *Edson v. Crangle*, 62 Ohio St. 49, 56 N. E. 647, the statute under consideration provided that any nets set in violation of its provisions should be confiscated wherever found and sold to the highest bidder and the proceeds placed to the credit of the fish and ²⁰³ game fund. The statute provided for a seizure and an appropriation of the nets, but failed to provide any legal procedure whereby they might be adjudged to be confiscated, and on that ground the statute was held void as not providing due process of law, and the judge writing the opinion expressly pointed out that the statute did not declare the nets a public nuisance to be summarily abated.

Being of the opinion that the act of 1898 is not unconstitutional on the grounds upon which the question is raised, it is unnecessary to consider the constitutionality of the act of 1902, or the other questions raised by the answer.

Judgment reversed and judgment for plaintiff in error.

Spear, C. J., Davis, Shauck and Crew, JJ., concur.

The Principal Case finds support in Lawton v. Steele, 119 N. Y. 226, 16 Am. St. Rep. 813. See, too, *Rea v. Hampton*, 101 N. C. 51, 9 Am. St. Rep. 21; *Woods v. Cottrell*, 55 W. Va. 476, post, p. 1004.

VENEDOCIA OIL AND GAS COMPANY v. ROBINSON.

[71 Ohio St. 302, 73 N. E. 222.]

OIL LEASE, when not Forfeited.—Under a lease or grant whereby, in consideration of one dollar, a grant is made of all the oil and gas on specified premises, with a right to enter thereon for drilling and operating wells, and reserving to the grantor one-sixth of the oil produced and saved from the premises, and providing that in case no well should be completed within ninety days, the grant was to become void, unless the second party should pay twenty-five cents per acre per year, there is an implied covenant on the part of the lessee that he will drill and operate such number of oil wells on the lands as ordinarily would be required for the production of the oil therein contained, but the breach of the covenant does not work a forfeiture of the lease, and the remedy is in damages only. If a certain cause of forfeiture is expressed in a lease, others may not be implied. (p. 776.)

OIL LEASE when Becomes a Lease from Year to Year.—If a grant or lease of land for the purpose of drilling and operating for oil and gas provides that in case no well is completed within ninety days the grant shall become void unless the grantee shall first pay pecuniary sums per acre per year, the lessee, after the expiration of the ninety days and until a well is drilled, becomes a lessee from year to year at the annual rental specified. If at the end of a year the lessee refuses to accept further payments, he thereby refuses longer to waive performance, but the lease does not so instanti terminate and the parties are left as to the implied engagement to comply as they were at the time of the execution of the lease. (p. 51.)

It is to require the interference by the defendants with the development of oil and gas on certain premises and to declare void a lease heretofore made to the defendant Speaker. The plaintiff claimed as assignee of a grant or lease made by the defendants hereinafter to C. S. King & Company, and by the latter, on December 1, 1902, assigned to the plaintiff corporation. This grant or lease was as follows:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, H. O. Robinson and S. M. Robinson, first parties, hereby grant unto C. S. King & Company, second party, all the oil and gas in and under the following described premises together with the right to enter thereon at all times for the purpose of drilling and operating for oil or gas, and to erect and maintain all buildings and structures, and lay all pipes necessary for the production and transportation of oil or gas taken from said premises. Excepting and reserving, however, to first parties the one-sixth part of all oil produced and saved from said premises to be delivered in the pipe-line with which second party may connect his wells, namely: All that certain lot of land situated in the township of Liberty, county of Van Wert, in the state of Ohio, bounded and described as follows, to wit: The east half of the southeast quarter, section 8, town 3, range 3, containing eighty acres, more or less.

"To have and to hold the above premises on the following conditions: If gas only is found, second party agrees to pay one hundred dollars each year for the product of each well while the same is being used off the premises, and first parties to have gas free of cost to heat all stoves in dwelling-house during the same time.

"Second party shall bury all oil and gas lines, and pay all damages done to growing crops by reason of burying and rearing said pipe lines when so requested by first party.

"A well shall be drilled nearer than three hundred feet of barn or orchard without consent of first party.

"In case no well is completed within ninety days from date hereof, unavoidable delay excepted, then this grant shall become null and void, unless second party shall pay to first parties, twenty-five cents an acre per year, payable by deposits at the — or directly to first party, after demand having first been made.

"The second party shall have the privilege to use sufficient gas, oil and water from said premises to operate machinery (water wells now on said premises excepted), and the privilege of removing all their machinery and materials at any time. It is agreed and understood by the parties hereto when written conditions hereinafter provided for the drilling of additional wells after first well is completed, such additional wells must respectively be paying oil wells; if not further development shall be optional with second party.

"If this lease is surrendered from any cause, such surrender shall not affect producing well or wells with ten acres surrounding them.

"It is understood between the parties hereto that these agreements shall extend to and bind their heirs, executors, administrators and assigns.

"Witness our hand this third day of December, 1901."

On February 2, 1903, Robinson entered into a contract with the defendant Speaker in the nature of an oil and gas lease, and both he and the plaintiff brought lumber on the premises with the intention of erecting a derrick and boring a well. Rent under the lease claimed by the plaintiff had been paid to March 2, 1903, at which time a tender of the further sum of twenty dollars being made, was refused. The court of common pleas granted relief as prayed for, but the circuit court, on appeal, dismissed the petition of the plaintiff.

Cable & Parmenter, for the plaintiff in error.

Saltzgarber, Hoke & Osborn and Daily, Simmons & Daily, for the defendants in error.

314 SUMMERS, J. For what reasons the circuit court dismissed the petition we are not advised. The execution and delivery of the written instrument and the performance of its express conditions are admitted, excepting that it is averred that no well was drilled within said ninety days, and that possession of said premises never was taken or attempted to be taken otherwise than as narrated on said seventh day of March. So

the "unit" clause are to be determined by the interpretation of the lease.

In *Thompson v. Ohio Oil Co.*, 12 Ohio St. 113, 43 N. E. 502, it was held that a lease which is to the extent of development is an implied covenant on the part of the lessee that he will drill and operate such number of oil wells on the lands as will be required for the production of the oil. It was held that the intent of such a covenant does not work a forfeiture of the lease for non-compliance in damages, and that the clause of forfeiture being specified in the lease does not render it required.

In *Thompson v. Ohio Oil Co.*, 12 Ohio St. 517, 63 N. E. 76, a lease was held to be in compliance with the law under consideration, although it contained a surrender clause, was interpreted, and it was there held that one dollar was a sufficient consideration, and that the lease was not void for want of consideration, and that a clause giving the lessee the right to surrender the lease at any time did not operate as a forfeiture.

In *Thompson v. Ohio Oil Co.*, 12 Ohio St. 113, 43 N. E. 502, an oil lease was held to be in compliance with the law. It contained a clause providing that the lessee or well is to be completed within thirty days of the date of the lease, and that the well shall become an oil well and shall produce oil within thirty days of the date of completion. It was held that the lease was not void for want of consideration, and that the clause giving the lessee the right to surrender the lease at any time did not operate as a forfeiture.

The case is also reported in the *Reporter* under consideration in the *Reporter* from *Thompson v. Ohio Oil Co.*, 12 Ohio St. 113, 43 N. E. 502, where it is held that a grant of oil and gas is not void for want of consideration, and that the clause giving the lessee the right to surrender the lease at any time did not operate as a forfeiture. It was also held that the clause giving the lessee the right to surrender the lease at any time did not operate as a forfeiture.

and held to the conclusion that the plaintiff has a

valid lease of these premises for oil and gas, and that the lessor, by acceptance of the stipulated rental, has waived performance of the implied engagement to develop the premises, to the end of the last year for which rent was paid.

We have not undertaken to determine whether the instrument technically is a lease or a license, or less than a lease but more than a license. It is the agreement the parties have seen fit to make, and since it ³¹⁶ does not contravene any rule of law and is not controlled by statute, by it the rights of the parties should be determined. In *Consumers' Gas Trust Co. v. Litler*, 162 Ind. 320, 70 N. E. 363, a similar lease was under consideration, and it is there held that there was an implied engagement by the lessee to explore for oil and gas which, if not performed within a reasonable time, entitled the lessor to a forfeiture, but that the lessor's acceptance from year to year of the stipulated annual rental was a waiver from year to year of performance, and that the lessor could not, at the end of the last year, claim a forfeiture by refusing to accept another payment, but that the relations of the parties then stood, with respect to the lessor's right of forfeiture, precisely as they were at the moment the contract was executed.

This gives effect to the agreement according to the intention of the parties. In case of default after demand, the lease by its express terms is at an end. By accepting the rental stipulated, performance of the implied engagement to develop the premises was waived to the end of each year for which it was accepted, and, by refusing to accept the rent tendered on March 2, 1903, the lessor refused longer to waive performance.

The lease under consideration in *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N. E. 502, in terms granted the premises for the purpose of operating for oil and gas, while in the lease in the case under consideration the grant is of the oil and gas under the premises, together with the right to enter thereon for the purpose of drilling and operating for oil and gas. It is there held that a breach of an implied covenant does not work a forfeiture of the lease. Whether the lease under consideration is so different that a failure by the lessee ³¹⁷ to perform the implied engagement to develop the premises would be ground of forfeiture, we do not determine. It is sufficient to say that the refusal to accept rent for the ensuing year did not eo instanti terminate the lease, but left the rights of the parties respecting the implied engagement to develop the premises as they were at the time of the execution of the lease.

that plaintiff's rights are to be determined by the interpretation of the lease.

In *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N. E. 502, it is held that in such a lease, while as to the extent of development there is an implied covenant on the part of the lessee that he will drill and operate such number of oil wells on the lands as ordinarily would be required for the production of the oil therein contained, the breach of such a covenant does not work a forfeiture of the lease but that the remedy is in damages, and that certain causes of forfeiture being specified in the lease others may not be implied.

In *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76, a lease almost identical in its provisions with the one under consideration, excepting that the habendum clause limited it for a term of two years, and that it contained a surrender clause, was interpreted, and it was there ruled that one dollar was a sufficient consideration that the lease was not void for want of mutuality, and that a clause giving the lessee the right to surrender the lease at any time did not create an estate at will.

In *Van Etten v. Kelly*, 66 Ohio St. 605, 64 N. E. 560, another similar lease was under consideration. ³¹⁵ It contained the following clause: "In case no well is completed within thirty days from this date, then this grant shall become null and void unless second party shall pay to said first party thirty dollars each and every month in advance while such completion is delayed." It was held that this gave the lessee the option by making the payment to continue the lease in force to the end of the term without completing the first well, or upon failure to make such payment, to allow the lease to become null and void at the end of thirty days after the date of the lease.

The case at bar respecting the question under consideration is not distinguishable from *Central Ohio etc. Gas. Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281, where it is ruled that a grant without limitation as to time of all the oil, etc., upon the following terms: "First, second party agrees to drill a well upon said premises within six months from this date, or thereafter pay first party one hundred and sixty dollars annually until said well is drilled, or the property hereby granted is reconveyed to the first party," is, after the expiration of six months and until a well is drilled, a lease from year to year at the option of the lessee, at an annual rental of one hundred and sixty dollars.

These cases lead to the conclusion that the plaintiff has a

valid lease of these premises for oil and gas, and that the lessor, by acceptance of the stipulated rental, has waived performance of the implied engagement to develop the premises, to the end of the last year for which rent was paid.

We have not undertaken to determine whether the instrument technically is a lease or a license, or less than a lease but more than a license. It is the agreement the parties have seen fit to make, and since it ³¹⁶ does not contravene any rule of law and is not controlled by statute, by it the rights of the parties should be determined. In *Consumers' Gas Trust Co. v. Litler*, 162 Ind. 320, 70 N. E. 363, a similar lease was under consideration, and it is there held that there was an implied engagement by the lessee to explore for oil and gas which, if not performed within a reasonable time, entitled the lessor to a forfeiture, but that the lessor's acceptance from year to year of the stipulated annual rental was a waiver from year to year of performance, and that the lessor could not, at the end of the last year, claim a forfeiture by refusing to accept another payment, but that the relations of the parties then stood, with respect to the lessor's right of forfeiture, precisely as they were at the moment the contract was executed.

This gives effect to the agreement according to the intention of the parties. In case of default after demand, the lease by its express terms is at an end. By accepting the rental stipulated, performance of the implied engagement to develop the premises was waived to the end of each year for which it was accepted, and, by refusing to accept the rent tendered on March 2, 1903, the lessor refused longer to waive performance.

The lease under consideration in *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N. E. 502, in terms granted the premises for the purpose of operating for oil and gas, while in the lease in the case under consideration the grant is of the oil and gas under the premises, together with the right to enter thereon for the purpose of drilling and operating for oil and gas. It is there held that a breach of an implied covenant does not work a forfeiture of the lease. Whether the lease under consideration is so different that a failure by the lessee ³¹⁷ to perform the implied engagement to develop the premises would be ground of forfeiture, we do not determine. It is sufficient to say that the refusal to accept rent for the ensuing year did not eo instanti terminate the lease, but left the rights of the parties respecting the implied engagement to develop the premises as they were at the time of the execution of the lease.

It follows that the circuit court erred in dismissing the petition, and, upon the admitted facts, this court rendering the decree that court should have rendered grants the relief prayed for in the petition.

Reversed.

Spear, C. J., Davis and Shauck, JJ., concur.

An Oil Lease partakes more of the character of a lease for tillage rather than of a lease for mining or quarrying solid minerals: *Wetengel v. Gormley*, 160 Pa. St. 559, 40 Am. St. Rep. 733. See, also, *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 97 Am. St. Rep. 1027. A lease of land for oil purposes imposes on the lessee the duty to test thoroughly the existence of oil in the rocks that should bear it, and, if oil is found, to sink as many wells as may be necessary to secure so much of the oil from the land demised as may be obtained with profit: *McKnight v. Manufacturers' Nat. Gas Co.*, 146 Pa. St. 185, 28 Am. St. Rep. 790. If the parties provide for a test well, and what shall be done in case it produces oil in paying quantities, but make no provision in case the well proves dry, there is an implied obligation on the part of the lessee, if the test well proves dry, to proceed with the exploration and development of the land with reasonable diligence, according to the usual course of business: *Aye v. Philadelphia Co.*, 193 Pa. St. 451, 74 Am. St. Rep. 696.

STATE v. AUSTIN.

[71 Ohio St. 317, 73 N. E. 218.]

CRIMINAL LAW—Insanity, Burden of Proving.—When, in a criminal prosecution, the insanity of the defendant is relied upon as a defense, such defense is affirmative, and the burden to establish it by a preponderance of the evidence rests on the defendant. (p. 780.)

CRIMINAL LAW—Insanity—Burden of Proof where the Defendant is Shown to have been Once Insane.—The proof, on a prosecution for murder, that the defendant had once been insane and that his insanity was recurrent with suicidal and homicidal tendencies, and that he had been discharged from an insane asylum nearly two years before the commission of the homicidal act, does not relieve him from the burden of proving that his insanity existed when such act was committed, nor cast upon the state the burden of proving that such commission was during a lucid interval. (pp. 781, 782.)

CRIMINAL LAW—Insanity—Charge to Jury Respecting the Effect of Evidence of Prior Insanity.—On a trial for murder, the defendant, on showing that he was once committed to an insane asylum for recurrent insanity of suicidal and homicidal character, is not entitled to an instruction to the jury that "proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defeats the legal presumption of sanity and creates a legal presumption of continued lunacy." (pp. 782,

1.)

Harry W. Miller, for the plaintiff.

Theodore K. Funk and Cecil S. Miller, for the defendant in error.

³¹⁹ CREW, J. At the September term, 1903, of the court of common pleas of Scioto county, Ohio, the defendant in error, Levi S. Austin, was indicted, tried and convicted of the crime of murder in the first degree for the killing of one Harry Hornung on the twenty-eighth day of August, 1903. A motion for a new trial was duly filed by the defendant, Levi S. Austin, which motion was upon consideration thereof by the trial court overruled, and the jury impaneled in said cause having included in its verdict a recommendation of mercy the defendant was thereupon, on the overruling of said motion, sentenced by the court to imprisonment for life in the Ohio penitentiary. At the trial in the court of common pleas there was no conflict or controversy in the evidence as to the fact that the defendant, Austin, on the day named in the indictment, August 28, 1903, shot and killed said Harry Hornung. The killing was not disputed, but under the plea of not ³²⁰ guilty the defense was interposed that at the time of such killing the defendant was then insane. On petition in error to the circuit court the judgment of the court of common pleas was reversed and the verdict of conviction was set aside, for the reason and on the sole ground as stated in the entry of reversal, that said court of common pleas erred in refusing to give to the jury the following instruction requested by the defendant, viz.: "Proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defeats the legal presumption of sanity and creates a legal presumption of continued insanity." To reverse this judgment of reversal the state prosecutes this proceeding in error. Whether the instruction so asked by defendant is a proper instruction and correctly states the rule of law upon the propositions involved therein and should therefore have been given to the jury in the form requested, is the question presented here for our determination. It must now be taken as the well-established rule of law in this state, because of the numerous and uniform decisions of this court upon that subject, that in a criminal case when the insanity of the defendant is pleaded or relied upon as a defense that such defense is affirmative in character, and the burden of maintaining or establishing the same by a preponderance of the evidence rests with the defendant: Loeffner v. State, 10 Ohio St.

598; *Bond v. State*, 23 Ohio St. 349; *Bergin v. State*, 31 Ohio St. 111; *Kelch v. State*, 55 Ohio St. 146, 60 Am. St. Rep. 680, 45 N. E. 6, 39 L. R. A. 737.

The authorities would seem also to be in entire accord upon the proposition that where a person is indicted and prosecuted for the commission of a crime, in order to make the insanity of the accused ³²¹ available and effective to him as a defense, such insanity must be shown to exist at the very time of the commission of the act complained of. The law requires that the insanity proved, in order that it may be defensive, shall relate to the time of the commission of the alleged criminal act, and proof of the insanity of the defendant at a time prior thereto cannot of itself exempt him from punishment or acquit him of criminal responsibility. While it is entirely competent in a criminal case where the sanity of the accused is put in issue to show his mental condition both before and after the time of the commission of the alleged criminal act, yet from such evidence of his previous or subsequent mental condition no legal presumption arises that he was insane at the time he committed the criminal act, and such evidence is proper for the consideration of the jury only in so far as it reflects or throws light upon, or may aid the jury in determining, the question of whether in fact the insanity of defendant existed at the time of the alleged criminal act. It appears from the record in this case that the defendant in error, Levi S. Austin, was adjudged insane and on June 18, 1900, was committed to the Southwestern State Hospital for the insane at Marion, Virginia, and was discharged therefrom on September 1, 1900. He was afterward readmitted to the same institution July 29, 1901, and discharged therefrom as restored on December 21, 1901, almost two years prior to the time of the alleged homicide. The nature of his disease or malady was, as testified by the physicians, that of "recurrent insanity or recurrent mania with suicidal and homicidal tendencies." While other evidence was introduced on the trial for the purpose of showing the conduct and ³²² actions of the defendant prior and up to the time of the homicide, yet it is upon the proof made of these prior adjudications of defendant's insanity that counsel predicate the claim that the special instruction requested by them in this case was correct and should have been given to the jury in the form requested. It is their contention that such proof of prior insanity established for the accused a status which overthrew and defeated the legal presumption of his sanity and created a legal presumption of his

continued insanity, thereby imposing upon the state the burden of proving that the act charged was committed by him during a lucid interval. In support of such contention, and as sustaining the correctness of the instruction asked by them, they cite us to a charge found in a footnote appended to the opinion of the court in the case of *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481. This charge, ascribed to Judge Birchard, has, in one particular at least, viz., in so far as it defines or prescribes a rule as to the quantum of evidence requisite to establish the defense of insanity, been expressly disapproved and overruled by this court in *Kelch v. State*, 5 Ohio St. 151, 60 Am. St. Rep. 680, 45 N. E. 6, 39 L. R. A. 737, and we are now clearly of the opinion that said charge is equally objectionable and erroneous in the effect it ascribes to the proof of prior insanity in criminal cases. The doctrine announced and the rule prescribed by this charge upon that subject is so out of harmony with the clear weight of authorities upon that proposition that we cannot admit its correctness. The charge in the above case as to the burden of proof and the legal presumption arising from proof of prior insanity is, in language and form, identical with the instruction asked by defendant in this case and is, as hereinbefore stated, as follows: ⁸²³ "Proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defeats the legal presumption of sanity and creates a legal presumption of continued lunacy." The particular vice of this instruction is that it states the rule too broadly. It is doubtless true that insanity is often chronic and permanent—for instance, from senile dementia and congenital idiocy there can be, as a rule, no recovery, and where insanity in such form is once proven to exist, its continuance may be inferred or presumed, such inference or presumption, however, being one of fact and not of law. There are perhaps but few other forms of insanity of which recovery may not be predicated, at least as a contingency, and as to these no presumption whatever is indulged or recognized that they are continuing in their nature: Underhill on Criminal Evidence, sec. 156.

Therefore, the burden being upon the defendant to show that he was insane at the time of the commission of the particular act charged, proof of mere temporary or recurrent insanity, such as is shown in this case, at a time prior thereto, is clearly not sufficient to rebut or overcome the legal presumption of his sanity and to impose upon the state the burden of proving that

at the time the act was committed the defendant was then sane. The burden of proof does not shift, but all along it rests with the defendant, and if in any case he would overcome the legal presumption of his sanity and would exonerate himself from liability, he must show by a preponderance of the evidence that at the time of the commission of the alleged criminal act he was then so far mentally deranged or unsound as not to be answerable or accountable for his act. While proof of prior insanity ³²⁴ is competent, whether a mental condition shown to exist has continued down to the time of the commission of the alleged criminal act is solely a question of fact to be determined by the jury. And the defendant in a criminal case who sets up insanity as a defense does not relieve himself from showing his insanity at the very time of the commission of the criminal act by proof merely that he was insane at an earlier time. In the case of *Wheeler v. State*, 34 Ohio St. 395, 32 Am. Rep. 372, A, being on trial for a crime, relied on insanity as a defense, and as evidence tending to prove this defense offered a record from the probate court showing that four years previous to the commission of the alleged crime an inquest had been held in that court, and that he had been adjudged insane and confined in an asylum, the court held that the evidence was admissible, but the learned judge who wrote the opinion in that case, speaking of the office and effect to be given to such evidence, at page 396, 34 Ohio St., 32 Am. Rep. 372, says: "Inquests of this character are analogous to proceedings in rem, affecting the general and public interest, and no one can strictly be regarded as a stranger to them. And such condition of things as the insanity of a party being shown, there is a presumption of more or less force, according to circumstances, that the same condition continued. Nor does the time which may have elapsed since the inquest was held affect the question of its admissibility (*Sergeson v. Sealey*, 2 Atk. 412), though of course, it may have great force on the question of the weight of the evidence.

"Ordinarily, such inquiries are not conclusive, but only prima facie evidence of incapacity, as will be seen from the authorities cited; but, on a question ³²⁵ like that in issue here, it is manifest they cannot be regarded as even prima facie evidence."

In the present case the jury was correctly instructed by the trial court on the question of the burden of proof and on the matter of insanity as a defense, and for the reasons we have

herein stated we think there was no error in refusing to give the instruction asked by defendant in the form it was requested.

Finding no error in the record such as warranted the reversal of the judgment of conviction in this case, the judgment of the circuit court must be reversed and that of the common pleas affirmed.

Judgment accordingly.

Spear, C. J., Davis, Shauck, Price and Summers, JJ., concur.

Insanity as a Defense to Crime is discussed in the monographic notes to State v. Marler, 36 Am. Dec. 402-410; People v. Hubert, 63 Am. St. Rep. 100-108; Knights v. State, 76 Am. St. Rep. 83-97. A reference to pages 92-97 of this last note will show that there is no little diversity of judicial opinion on the question of burden of proof when the defense of insanity is set up. In the recent well-considered case of State v. Clark, 34 Wash. 485, 101 Am. St. Rep. 1006, it is held that the burden of proving insanity is upon the defendant, who must establish it by a preponderance of the evidence. The presumption that sanity or insanity continues, when the defense of insanity is raised in a criminal trial, is discussed in the note to Knights v. State, 76 Am. St. Rep. 85, 86.

CITY OF MT. VERNON v. STATE.

[71 Ohio St. 428, 73 N. E. 515.]

CONSTITUTIONAL LAW—Estoppel to Question Statute.—The principle of estoppel applies as well where proceedings of a municipal corporation are questioned on the ground of the unconstitutionality of the statute under which they are had as where they are attacked on other grounds, unless such proceedings, or what is sought to be accomplished by them, are per se illegal or malum prohibitum. (pp. 787, 788.)

ESTOPPEL to Resist Enforcement of Street Assessment on the Ground that the Statute on which it was Made is Unconstitutional.—Where a majority of abutting lot owners petition a city council to pave a street, and, after due notice, proceedings are taken for its paving, and bids are made for doing the proposed work, all before any question of the constitutionality of the statute arises, but thereafter and after a decision has been made by the supreme court under which it is probable that such statute may be declared unconstitutional, the bids are accepted and a contract entered into, without objection, for doing the work, the city authorities cannot, after obtaining the benefit of the contract, claim that they had no power to enter into it, because the statute authorizing it is unconstitutional. (p. 789.)

MANDAMUS.—A Controversy between Parties to a Contract respecting their rights thereunder cannot be determined in proceedings by mandamus. (p. 789.)

Application for a writ of mandate to require the president and members of the city council of Mt. Vernon to pass an ordinance providing for the assessment of that portion of the cost of a street assessment contracted for between the city and the relator which was to be paid for by the property owners, and to pass an ordinance for issuing bonds of the city, and to proceed to sell the same and out of the proceeds to pay the relator a sum specified and claimed to be due him upon his contract. The answer of the defendants (1) tendered an issue as to whether the contract between the city and the relator had been completed according to the plans and specifications; (2) pleaded that the statute relied upon as authorizing the doing of the work and the issuing of the bonds was unconstitutional, because forbidden special legislation; and (3) that at the time the improvement was let and the contract entered into there was no corporation auditor of the city, and the city clerk did not certify that the money required for the contract or to pay the appropriation or expenditure was in the treasury, and to the credit of the fund from which it was to be drawn and not appropriated for any other purpose. The trial court dismissed the application. On appeal to the circuit court, the relator demurred to the second and third defenses, and the demurrer was sustained. The finding of fact as to the other issue was that the relator substantially performed his contract, but that there were some defects in his performance which the city council had required to be repaired, that he repaired such defects to the satisfaction of the city engineer, but the city council had never afterward examined the work, and that some other defects were afterward discovered of small importance compared with the entire work performed by the relator, and his failure to remedy these defects was due to the fault of the city council and its paving committee. The final judgment of the court was that the relator was entitled to the writ, but that he should furnish certain material and labor and put the street in good condition, as required by his contract. A motion was made to amend the findings, which, being overruled, the defendants excepted and prosecuted a proceeding in error to reverse the judgment of the circuit court.

J. B. Graham, F. V. Owen and J. M. Butler, for the plaintiffs in error.

Waight & Moore and J. C. Talman, for the defendants in error.

⁴⁴⁶ DAVIS, J. The statute under authority of which the contract in question was made was passed in April, 1900 (94 Ohio Laws, 119). It does not differ very materially from the general provisions of the Revised Statutes in regard to its subject matter, except as indicated in its title—that is, it authorizes the city to pay not exceeding one-half of the costs and expenses ⁴⁴⁷ thereof and to issue bonds for such purposes. It also provides that section 2702 of the Revised Statutes shall not apply to contracts made under the act. Power to improve the streets, to make assessments on abutting lot owners, to issue bonds in anticipation of the payment of assessments, and to pay a certain proportion of the costs and expenses of the improvement, was already invested in all the cities and villages of the state.

The classification which is applied in the act in question would have been accepted generally as constitutional, prior to the decisions of this court which led to the extraordinary session of the general assembly in October, 1902; and such view would have been justified by former utterances of this court. The act itself has not yet been specifically declared to be unconstitutional by this court, although doubtless it may be justly inferred from the decision announced in *State v. Jones*, 66 Ohio St. 453, 90 Am. St. Rep. 592, 64 N. E. 424, that such a conclusion would be reached. In that case it was held that the system of classification and reclassification into classes and grades of classes, as then in vogue, was unconstitutional because it evinced an intention of the legislature to isolate the principal cities of the state into classes each containing but one city. That was admittedly so in the case then before the court and also in *State v. Beacom*, 66 Ohio St. 491, 90 Am. St. Rep. 599, 64 N. E. 427. In the case first cited it was held that “an act to confer such power upon a single city by such classification is repugnant to section 1 of article 13 of the constitution.” The court also expressly reserved an opinion on the question whether the provisions of the sixth section of article 13 is an exclusive classification of municipalities into cities and villages. ⁴⁴⁸ The classification of this act, “cities of the second class and fourth grade,” unlike the classification in most, if not all, other cases, included a considerable number of cities in different parts of the state, being cities of not more than ten thousand population and not less than five thousand. So that with the considerations already suggested, there was ground for a contention that the present act ultimately would be held

to be constitutional; and this is so although we may assume, for the purposes of this case, that under the decisions to which we have referred the act would have been held by this court to have been unconstitutional.

The relator contends that whether the act be unconstitutional or not, as being special legislation, the city is estopped from setting up that defense, inasmuch as it entered into this contract immediately after the decisions of this court which have been referred to were announced, with no objection or suggestion as to its want of power to make the same, and the plaintiff entered upon the performance of his contract and completed it before the objection was made that this act was unconstitutional. It may be accepted as the law that there can be no estoppel where there is an entire absence of power; but the answer to that in this case is, that the corporation was not acting *ultra vires*—that is, without any power whatever under the act in question or from any other source. For, as it has already been suggested, the city had ample power to improve the streets and to pay for them under other statutes, this statute differing only in the details as to the amount that the city should pay as its portion of the costs and expenses and as to the manner in which bonds should be issued, sold and the proceeds applied, and ⁴⁴⁹ in the provision that section 2702 of the Revised Statutes shall not apply to contracts made under the provisions of this act. The act provides: "Sec. 9. All other provisions of the Revised Statutes relative to the improvement of streets and alleys, and assessments to pay the cost thereof, not inconsistent with the provisions of this act, shall remain in full force and be followed by councils of such cities in making improvements and assessments therefor." The powers elsewhere granted to the municipality are expressly read into this act in aid of it by this provision; and it follows that a contract made under this act must necessarily be supported by powers elsewhere granted to the municipality. Hence it cannot be true in this instance that, conceding the unconstitutionality of the act there was a total want of power in the city to make the contract. It is precisely such a case as that in which it often has been held that a municipal corporation may be estopped, because the existence of an apparent corporate power to contract upon the subject matter and the silence of the municipality in relation to matters of less obvious importance may entrap an innocent party into disastrous consequences.

While it is generally true that unconstitutional statutes are nullities from the beginning and that everything done under them is absolutely void, yet it is not universally so. It was said by the court in *Findlay v. Pendleton*, 62 Ohio St. 88, 89, 56 N. E. 649: "Liabilities are occasionally enforced against parties growing out of proceedings under an unconstitutional act, as in *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438, and *Mott v. Hubbard*, 59 Ohio St. 199, 53 N. E. 47, but such enforcement is not by virtue of the unconstitutional act, but by virtue of the acts of the parties whereby they have ⁴⁵⁰ become estopped from contesting the liability against them." In *State v. Mitchell*, 31 Ohio St. 592, it was held that an act to provide for the improvement of streets and avenues in certain cities of the second class was unconstitutional, and that "notwithstanding the unconstitutionality of the act, where the abutting lot owners have caused a street to be improved under the act, and bonds of the city to be negotiated to pay for the improvement, all who have participated in causing the improvement to be made are estopped from denying the validity of an assessment made in accordance with the act to pay such bonds." And in the opinion it was said: "The principles of estoppel apply where the proceedings are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as where they are sought to be impeached on other grounds : *Ferguson v. Landran*, 1 Bush, 548; *Ferguson v. Landran*, 5 Bush, 230, 96 Am. Dec. 350. Hence, notwithstanding the unconstitutionality of the act, the rights of third parties have so intervened that it is the duty of the commissioners to complete the apportionment of the assessment in accordance with the terms of the act." In *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438, it was determined by this court that: "The principles of estoppel apply as well where proceedings of a corporation are questioned on the ground of the unconstitutionality of the statute under which they are had, as where they are attacked upon other grounds, unless such proceedings, or what is sought to be accomplished by them, are per se illegal or malum prohibitum. Want of power in the corporation may be waived, or an estoppel may arise from failure to assert it at the proper time." It is replied to this argument that the cases now cited are cases ⁴⁵¹ in which the principle of estoppel was held to apply as against private individuals only, and that it was not determined in any of these cases that estoppel will run against a municipal

corporation where the statute under which it assumed to act is unconstitutional. But no good reason appears why the doctrine of estoppel should not be applied as against a municipal corporation as well as a private individual where the power to act does not entirely depend upon the unconstitutional act, and this seems to be the purport of the authorities: 1 Dillon on Municipal Corporations, 4th ed., sec. 457; 2 Dillon on Municipal Corporations, sec. 935; 1 Smith on Municipal Corporations, secs. 227, 229, 233; 2 Herman on Estoppels, sec. 1223.

Now, what are the facts in the present case which raise the question of estoppel? Sometime in the spring of 1902, the precise date not appearing in the record, a majority of the abutting lot owners petitioned the council of the city of Mt. Vernon to pave Gambier street and Gambier avenue between Main street and Rogers street. Due notice was given of the filing of this petition, and the council thereafter determined that a majority of the owners of the real estate abutting on the improvement had signed the petition; that the material petitioned for by them was proper material to be used in the improvement; that it was necessary to improve the street and avenue as asked for in the petition; and thereupon the council determined by resolution that it was necessary to improve the said street and avenue by grading and paving the same, and assess the cost thereof, except at the intersection of the streets thereon, back upon the abutting property, and to issue bonds of said city according to law for the payment of the cost and expense of making said improvement. ⁴⁵² Thereafter the city caused its proper officers to prepare plans and specifications for said improvement, and the city advertised for bids for furnishing the material and doing the work of making said improvement according to said plans and specifications, and the relator bid on the work and was the lowest bidder therefor, and was thereby entitled by law to the contract for the performance of that work.

All of this took place prior to the decision of *State v. Jones*, 66 Ohio St. 453, 90 Am. St. Rep. 592, 64 N. E. 424. The relator's proposal was filed with the city on the sixteenth day of June, ten days before the announcement of that decision, June 26, 1902, and, for aught that appears, in perfect good faith and reliance, and certainly with good reason to rely, upon the constitutional validity of the statute under which these proceedings were had. Twelve days after the announcement of that decision, the city authorities accepted said proposal and entered into the written contract in question in this case, with-

out having suggested any objection upon the ground of the unconstitutionality of the act; nor was any such objection made until about the 13th of November, 1902.

Indeed, the presumption is just as strong that the city, by its officers, knew what had been decided in *State v. Jones*, 66 Ohio St. 453, 90 Am. St. Rep. 592, 64 N. E. 424 and *State v. Beacom*, 66 Ohio St. 491, 90 Am. St. Rep. 599, 64 N. E. 427, and what would be decided as to this act, if the case ever should arise, as the relator; and if with that knowledge the city accepted the relator's bid, made previous to those decisions and in reliance upon a previous line of decisions, and upon that bid entered into a contract with him, it indicates, at the least, a willingness that the relator should be misled to his irreparable injury and to the advantage of the city many thousands of dollars. These facts, and all the ⁴⁵³ considerations which we have adverted to, would seem to make it in the highest degree inequitable to allow the city authorities, after they had obtained the benefits of this contract, to make the claim of their utter want of power to enter into it or to perform it.

But another contention is made in the case, and that is, that section 2702 of the Revised Statutes, familiarly known as "the Burns law," has not been complied with. If we are right in our view that the plaintiffs in error are estopped from alleging the unconstitutionality of the act under which they proceeded, then there is nothing in the contention upon this point; for the act specifically provides in the seventh section thereof that "the provisions of section 2702 shall not apply to contracts made under the provisions of this act." This provision may be read as an exception to section 2702: *Cincinnati v. Holmes*, 56 Ohio St. 104, 46 N. E. 514; *Comstock v. Nelsonville*, 61 Ohio St. 288, 297, 56 N. E. 15.

But we think that the relator is at least premature in his application for relief by proceedings in mandamus. A distinct issue of fact is made in the record as to the performance of the contract by the relator according to the plans and specifications. It is true that the circuit court makes a finding that the contract was "substantially performed," but it also finds that there were certain defects in material and workmanship existing in the work at the time that it was examined by the city civil engineer and paving committee. In other words, the relator has not shown a clear legal right to recover under his contract. This controversy between the parties cannot be determined upon the petition for mandamus. Contractual rights can only be

settled in an action at law. ⁴⁵⁴ We therefore, for that reason alone, reverse the case and remand the same to the court of common pleas for further proceedings.

Judgment accordingly.

Spear, C. J., Price and Crew, JJ., concur.

Shauck, J., concurs in the third proposition of the syllabus and in the judgment.

The Applicability of the Doctrine of Estoppel to municipal corporations is discussed generally in Hutchinson etc. R. R. Co. v. Commissioners, 48 Kan. 70, 30 Am. St. Rep. 273; Gresten v. Chicago, 145 Ill. 451, 36 Am. St. Rep. 496; State v. Murphy, 134 Mo. 548, 56 Am. St. Rep. 515; State v. Pullman, 23 Wash. 583, 83 Am. St. Rep. 836. Where a city has demanded and received taxes for several years under an unconstitutional statute, treating it as if valid, it is estopped from claiming additional taxes for those years on the ground that such statute is unconstitutional: Philadelphia v. Ridge etc. Ry. Co., 142 Pa. St. 484, 24 Am. St. Rep. 512. On the estoppel of a private individual to deny the constitutionality of a statute, see Andrus v. Board of Police, 41 La. Ann. 697, 17 Am. St. Rep. 411; Eustis v. Bolles, 146 Mass. 413, 4 Am. St. Rep. 327; San Francisco v. Liverpool etc. Ins. Co., 74 Cal. 113, 5 Am. St. Rep. 425; Hutcheson v. Storrie, 92 Tex. 685, 71 Am. St. Rep. 884.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

WHITE v. HARRIS.

[69 S. C. 65, 48 S. E. 41.]

BILLS AND NOTES—Negotiability—Attorney's Fee.—A provision in a note to pay an attorney's fee after default for its collection does not render the note non-negotiable. (p. 793.)

BILLS AND NOTES—Alteration—Spoliation.—If a person who is under obligation to pay a note alters it by striking therefrom a provision for the payment of an attorney's fee for collection upon default in its payment, it is a material alteration and relieves the maker of liability thereon, but if a stranger strikes out such provision in the note, it is simply a spoliation and the maker remains liable. (pp. 794, 795.)

V. E. De Pass and J. G. Hughes, for the appellants.

W. W. Lewis, for the appellees.

¶ **POPE, C. J.** The defendants made their joint and several notes to Camp & Cross on the 22d of May, 1901, in these words:

"\$125.00 Union, South Carolina, May 22, 1901.

"September 1st, 1901, after date, we either of us promise to pay to the order of Camp and Cross, one hundred and twenty-five dollars at the banking house of Wm. A. Nicholson & Son, bankers, at Union, S. C., value received with interest after maturity at the rate of eight per cent per annum until paid. We agree in default of payment after maturity to pay ten per cent for attorneys' fees for collection.

"J. S. HARRIS,
"W. C. NELSON, and
"R. N. HARRIS."

*\$125.00

Union, South Carolina, May 22d, 1901.

"November 1st, 1901, after date, we or either of us promise to pay to the order of Camp and Cross one hundred and twenty-five dollars at the banking house of Wm. A. Nicholson & Son, bankers, Union, S. C., value received with ^{es} interest after maturity at the rate of eight per cent per annum until paid. We agree, in default of payment, after maturity, to pay ten per cent attorneys' fees for collection.

"J. S. HARRIS,
"W. C. NELSON, and
"R. N. HARRIS."

On the 14th of June, 1901, Camp & Cross, for value received, in writing indorsed said two notes to T. H. White and M. S. Lewis. A few days after said notes had been transferred to T. H. White and M. S. Lewis, one Cross, of the firm of Camp & Cross, who had indorsed the two notes to White and Lewis, came to White and stated that he had seen in the Charleston "News and Courier," a newspaper printed in the city of Charleston, South Carolina, that the words, "We agree in default of payment after maturity to pay ten per cent attorneys' fees for collection," inserted in a note, otherwise negotiable, would render such note unnegotiable. Cross then stated that he did not wish to have any trouble about this in the future, and that if White and Lewis would turn over the two notes to him, he would go to Union, South Carolina, and obtain those words stricken out from each note by the makers of said notes. He receipted to White and Lewis for the two notes, and went to Union to see the makers. He only saw one of the makers, as hereinafter mentioned. But Cross did not go any further as to the makers, but with his own hand ran the pen through those words in each note and carried the notes thus altered to the new holders, White and Lewis, and delivered them up. Both White and Lewis always protested that, if the words erased was not the act of the makers, they disclaimed any right thereto. Not being paid at maturity, White and Lewis had the notes duly protested for nonpayment, and they thereafter brought this action against the three makers, as defendants. These defendants denied their liability, insisting that the notes had been altered after they signed them, by striking out the words from said notes we have already described—which words in the two notes rendered them negotiable. The defendants also claimed that being unnegotiable notes, they were entitled to show that the same in the of the ^{es} present plaintiffs were subject to any defense

they had against Camp & Cross, and they pleaded that said notes were procured by gross misrepresentation and fraud. So that the matters came on for trial before Judge Buchanan and a jury. Both sides to the controversy asked the judge to instruct the jury to bring a verdict for the plaintiffs or defendants, respectively. The judge directed the jury to return a verdict for the plaintiffs for principal and interest and the costs of protest. This was done and judgment was entered upon such verdict. The defendants now appeal. The grounds of exception will be reported.

It must be apparent that this whole controversy is mainly hinged upon the determination of the question: Were those two notes negotiable or non-negotiable? The decisions of the supreme court of this state have not as yet settled what effect the insertion of the words, "we agree in default of payment after maturity to pay ten per cent attorneys' fee for collection," in a note will have upon it—that is, whether it is still a negotiable note or does it become an unnegotiable note? In the case of *Sylvester, Bleckley & Co. v. Alewine*, 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86, this identical question was presented. Two justices, Mr. Justice Gary and Mr. Chief Justice McIver, there held that the note becomes unnegotiable, while Mr. Justice Jones held to the contrary, and Mr. Justice Pope expressed no opinion on this question, holding that a new trial had to be ordered because of the mistake of the trial judge in improperly sustaining a demurrer. The two decisions of *National Bank v. Gary*, 18 S. C. 282, and *Carroll County Sav. Bank v. Strother*, 28 S. C. 505, 6 S. E. 313, are in no way decisive of this question. A promissory note is said, in 2 *American and English Encyclopedia of Law*, 314, to be "a written engagement by one person to pay another absolutely and unconditionally a certain sum of money at a time specified therein." These two notes here sued on certainly fill all the requirements of promissory notes down to the words we have already quoted. Do these words change the character of these notes? We think not. The ten per cent attorneys' ⁷⁰ fees are not to be paid until after the maturity of the notes. Besides, it has always been held in this state that a provision in a note for the payment of protest fees never alters the character of a promissory note. It is true that it is held in this state that a provision in a promissory note for the payment of the cost of exchange will change it to non-negotiable note. Why? Because the cost of exchange is an ever-varying matter. But look at these words: "We agree if this note is not paid at

maturity, we will pay ten per cent attorneys' fees." Are they not definite and certain? Very different are these words from those used in *Carroll County Sav. Bank v. Strother*, 28 S. C. 505, 6 S. E. 313, where a provision was inserted in the note to pay reasonable attorneys' fees and costs. Nothing could be more uncertain than the words used in the latter case. Now, we would use words of no uncertain sound or meaning. We wish to hold a definite and distinct promise to pay five or ten per cent attorneys' fees in an otherwise clear promissory note will not change its character from a promissory note.

With reference to exceptions alleging error in holding that striking out said provisions for attorneys' fees is not a material alteration. The material alteration of a note extinguishes all liability thereon as against parties not consenting: *Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743. Whatever changes the legal effect of the instrument is a material alteration. "The test is not whether an alteration increases or reduces a party's liability, but whether the instrument expresses the same contract—whether it will have the same legal effect and operation after the alteration as before": 2 Am. & Eng. Ency. of Law, 2d ed., 224, 225, and notes. The stipulation as to attorney fees is not material, in so far as the question of negotiability is concerned, but it is certainly material in so far as the contract liability of the parties is concerned. To add such words to a contract would certainly be a material change; to strike them out must also be material, if the test is whether the legal effect of the instrument is altered. In 2 Encyclopedia of Law, 238, it ⁷¹ is stated: "Any alteration in the amount of the principal of an instrument conditioned for the payment of money is material, whether such alteration increases or decreases the amount. Thus it has been considered a material alteration of an instrument to insert therein (*Monroe v. Paddock*, 75 Ind. 422), or erase therefrom (*First Nat. Bank v. Laughlin*, 4 N. Dak. 391, 61 N. W. 473) a provision for the payment of attorneys' fees in the case of suit brought, or to change the amount of the fee which is provided for in such clause: *Burwell v. Orr*, 84 Ill. 465." See, also, *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; 2 Daniel on Negotiable Instruments, 3d ed., sec. 1375; *Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743.

Now, with reference to whether the case should have been submitted to the jury. It does not appear that there was any evidence that defendants, J. S. Harris and R. N. Harris, ever con-

sented to the alteration of the note by Cross, but it was a matter proper for the jury to consider whether defendant, W. C. Nelson, consented to such alteration. It is true he testified that he did not consent, but, on the other hand, he testified to the effect that the change was made by Cross in his presence, and that he told Cross "if he wanted, to change it." It was for the jury to say whether Cross made the change in the presence of W. C. Nelson and with his acquiescence. If so, Nelson would be bound, whether the other defendants are released or not.

Furthermore, touching the question whether the change in the notes was an alteration or a spoliation, the case should have been submitted to the jury, under proper instructions as to the law. Contrary to the rule in England, the authorities in the United States generally hold that if a stranger to the contract, without any complicity with the grantee or obligee, materially alters an instrument in writing, that is a spoliation, and does not prevent a recovery on the original contract: 2 Daniel on Negotiable Instruments, 3d ed., sec. 1373; 2 Encyclopedia of Law, 2d ed., 214. Was Cross a stranger to the contract, having indorsed the same to the plaintiff? What was the character of the indorsement, was it without recourse, and ⁷² was he liable to pay the notes in any contingency at the time he made the change? Then, if we should suppose that Cross was a stranger to the contract, it must still be determined whether there was any privity between plaintiffs and Cross with respect to such alteration, a question proper for the jury in this case.

For these reasons we think the judgment should be reversed and the case remanded for a new trial, and it is so adjudged.

GARY, J., dissenting. I adhere to the views expressed by me in the case of *Sylvester, Bleckley Co. v. Alewine*, 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86, and therefore dissent on the ground that the note was non-negotiable.

A Promissory Note is not rendered non-negotiable, according to some authorities, by a provision for attorneys' fees in case of suit to enforce payment: *Oppenheimer v. Bank*, 97 Tenn. 19, 56 Am. St. Rep. 778; *First Nat. Bank v. Slaughter*, 98 Ala. 602, 39 Am. St. Rep. 88; *Dorsey v. Wolff*, 142 Ill. 589, 34 Am. St. Rep. 99; *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461. But see *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, and cases cited in the cross-reference note thereto.

The Unauthorized Alteration of written instruments is the subject of a monographic note to *Burgess v. Blake*, 86 Am. St. Rep. 80-134. If the amount of a promissory note is changed materially, either by a

payee or transferee, it is vitiated in the hands of the party responsible for the alteration: *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246. See, too, the note to *Burgess v. Blake*, 86 Am. St. Rep. 96. The effect of an alteration made by a stranger is discussed at pages 102-104 of this note.

DUNLAP v. SAVINGS BANK.

[69 S. C. 270, 48 S. E. 49.]

ADMINISTRATION—Collateral Attack Upon.—The jurisdiction of a probate judge to grant letters of administration upon the estate of a nonresident situated in his county cannot be collaterally attacked simply because the record does not affirmatively show that the greater part of the decedent's estate was in such county, and if the record does show that the decedent had some property in such county, it must be presumed that such judge had sufficient evidence before him to show that the greater part of the estate was in such county. (p. 797.)

W. J. Cherry, for the appellant.

W. M. Dunlap and T. F. McDow, for the appellee.

271 GARY, J. The appeal herein is from an order overruling the objection interposed by the defendant, that the court of probate was without jurisdiction in granting letters of administration to the plaintiff, on the ground that it did not appear upon the face of the records that the greater part of the nonresident intestate's estate was in York county, where the letters of administration were granted. The petition for letters of administration recited that the intestate, late of Lewis county and state of West Virginia, departed this life intestate, leaving a personal estate situated in the state of South Carolina amounting to about fifteen hundred dollars, which will require administration for the purpose of paying intestate's debts, etc. In the letters of administration granted by the court of probate is the following recital: "Whereas, A. A. McDonough, late of York county, deceased, lately died intestate, having whilst he lived and at the time of his death, divers goods and chattels, rights and credits within the state and county aforesaid," etc.

The order of the circuit court was as follows: "This is a very interesting point, and I will state, in giving my decision, that we have no doubt of the right of defendant to attack the record of the probate court, provided it is an absolute nullity on the ground that the court had no jurisdiction. Those facts, however,

must appear affirmatively upon the record, and if they do appear affirmatively upon the record, that the court had no jurisdiction, then it is an absolute nullity and may be disregarded in any proceeding. So, it is simply a question of whether or not the record shows affirmatively that the probate court had jurisdiction. Our supreme court has held in the case of *Browning v. de Lorme*, that the court of probate, though of limited jurisdiction, is a court of record, ²⁷² with very large powers; and, as to proceedings clearly within its jurisdiction, must not be regarded as an inferior court with respect to the dignity of its records.

"Section 39 of the Civil Code provides as follows: 'The probate of the will and the granting of administration of the estate of any person deceased shall belong to the judge of probate for the county in which such person was last an inhabitant; but if such person was not an inhabitant of this state, the same shall belong to the judge of probate in any county in which the greater part of his or her estate may be.'

"Section 49 of the code provides: 'The jurisdiction assumed by any probate court, in any case, so far as it depends on the place of residence or the location of the estate, shall not be contested in any suit or proceeding whatever except in an appeal from the probate court in the original case, or when the want of jurisdiction appears on the record.'

"In the case of *Hendricks v. Holman*, 58 S. C. 495, 36 S. E. 1010, the court makes a distinction between letters that show affirmatively the want of jurisdiction and where it only negatively appears, and they hold in that case that the granting of the letters of administration by the probate court must be presumed regular in all respects when questioned in another proceeding, unless the defect appears affirmatively on the face of the record.

"I, therefore, hold in this case, before I could sustain the objection to the jurisdiction of the probate court, that it must appear affirmatively upon the record that the greater part of his estate, if he is a nonresident, was not situate in York county. The record does not so show this affirmatively, and I must, therefore, presume that the probate judge, when he granted letters of administration, had sufficient evidence before him to show that the greater part of the estate was in this county, and that in making the order that he had jurisdiction, and I will, therefore, overrule the motion to dismiss the complaint."

The conclusions of his honor, the presiding judge, are likewise

sustained by the case of *In re Estate Mayo*, 60 S. C. 273 401, 38 S. E. 634, 54 L. R. A. 660, and his reasons are satisfactory to this court.

Judgment affirmed.

The Doctrine of the Principal Case will be found discussed in the extended note to *Dobler v. Strobel*, 81 Am. St. Rep. 548-552. See, too, *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299; *Hall v. Louisville etc. R. R. Co.*, 102 Ky. 480, 80 Am. St. Rep. 358; *Kling v. Connell*, 105 Ala. 590, 53 Am. St. Rep. 144. The record of the appointment of an administrator not disclosing want of jurisdiction in the court, the existence of jurisdictional facts must, it is held in *Bradley v. Missouri Pacific Ry. Co.*, 51 Neb. 653, 66 Am. St. Rep. 473, be conclusively presumed in a collateral proceeding.

DAVENPORT v. ESKEW.

[69 S. C. 292, 48 S. E. 223.]

DEEDS—*Rule in Shelley's Case*.—A conveyance, in form a fee simple, except that in the description of the property the words, "the above-named land to be held by B. during her natural life, then to be distributed equally between her remaining heirs," is governed by the rule in *Shelley's Case*, and vests a fee simple in B. (p. 799.)

McCullough & McSwain, for the appellant.

Schuman & Muckenfuss, for the appellee.

293 **WOODS, J.** The widow and children of Mathias Roberts agreed upon a division of his estate, and interchanged deeds for the lands. The deed to the widow, Matilda Roberts, is in form an ordinary fee simple conveyance, with general warranty, except the following sentence at the conclusion of the first paragraph describing and granting the land: "The above-named land to be held by Matilda Roberts during her natural life, then to be distributed equally between her remaining heirs."

Matilda Roberts died in 1903, leaving as her heirs her children, the plaintiff, Jane Davenport, and the defendants, Amanda Eskew and Elizabeth Chapman, and the other defendants, the infant children of a deceased son. By her will, Matilda Roberts directed her executors to sell the land conveyed to her in partition and divide the proceeds among her two daughters, Eskew and Elizabeth Chapman, and the children of her deceased son, to the exclusion of her daughter, the plaintiff. In her action for partition the plaintiff insists that under

the deed from the other heirs of Mathias Roberts the testatrix took only a life estate, and upon her death the land became the property of those who then answered to the description of heirs. The master and the circuit judge both held that the rule in Shelley's Case was applicable, and that the deed conveyed a fee simple title, which passed under the will of Matilda Roberts.

The much discussed question, whether the words "to be distributed equally," and similar expressions, are sufficient ²⁹⁴ to take a devise or conveyance out of the rule in Shelley's Case, must be regarded finally settled in this state by the unanimous judgment of this court in *Simms v. Buist*, 52 S. C. 561, 30 S. E. 400. This view is in accord with the highest authority elsewhere: 3 *Jarman on Wills*, 5th Am. ed., 144, 150; *Jesson v. Wright*, 2 *Bligh*, 1, 10 Eng. Rul. Cas. 714; 2 *Washburn on Real Property*, 652.

The appellant insists, however, that if the words "then to be distributed equally," standing alone, would not be sufficient to take the deed out of the rule in Shelley's Case, that the expression "remaining" should be held to mean surviving, and so construed, further limits the signification of the word "heirs."

It does not avail the plaintiff to give the words "remaining heirs" the same meaning as surviving heirs. When a grant or devise is to surviving children or surviving issue, as distinguished from children or issue generally, it is manifest that the intention is to take a particular class from a general class—to include those children or issue who survive and exclude those who do not. The word "surviving" in such case has a qualifying effect, and the rule laid down in *McCorkle v. Black*, 7 Rich. Eq. 407, and *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706, is applicable. But there can be no heirs except surviving or remaining heirs, and hence these words have no effect when used, as in this case, in connection with the general term heirs: *Appeal of Cockins*, 111 Pa. St. 26, 2 Atl. 363; *Criswell's Appeal*, 41 Pa. St. 288; *Heister v. Yerger*, 136 Pa. St. 445, 31 Atl. 122.

The judgment of this court is that the judgment of the circuit court be affirmed.

The Rule in Shelley's Case as applied to deeds will be found discussed in *Mudge v. Hammell*, 21 R. I. 283, 79 Am. St. Rep. 802; *Simonton v. White*, 93 Tex. 50, 77 Am. St. Rep. 824; *McIlhinny v. Ilhinny*, 137 Ind. 411, 45 Am. St. Rep. 186; *Chapin v. Crow*, 147 Ill. 219, 37 Am. St. Rep. 213; *Fletcher v. Tyler*, 92 Ky. 145, 36 Am. St. Rep. 584; notes to *Carpenter v. Van Olander*, 11 Am. St. Rep. 100-107; *Polk v. Faria*,

30 Am. Dec. 415-417. As to whether such expressions as "them to be equally divided" take a devise without the rule, see *McCann v. McCann*, 197 Pa. St. 452, 80 Am. St. Rep. 846; *Stigers v. Dinsmore*, 133 Pa. St. 482, 74 Am. St. Rep. 702.

PARSONS v. CHARLESTON CONSOLIDATED RAILWAY, GAS AND ELECTRIC COMPANY.

[69 S. C. 305, 48 S. E. 284.]

CORPORATIONS, ELECTRIC — Negligence — Noninsulated Wires.—The discharge of a fatal current of electricity from an electric company's heavily charged wire, through its coming in contact with another fallen wire, to the injury of a pedestrian, and due to defective and negligent insulation, renders the electric company liable, without regard to its actual knowledge of the fallen wire, or its diligence in discovering it. (p. 302.)

Mordecai & Gadsden, for the appellant.

Nathans & Sinkler, for the appellee.

305 WOODS, J. The plaintiff, administratrix of Edward Parsons, alleges that her intestate's death was caused by coming in contact with a wire of the defendant, Gordon Telephone Company, which, having fallen across the wire of the Charleston Consolidated Railway, Gas and Electric Company, was highly charged with electricity. The liability of the telephone company is not involved in this appeal. In the complaint it is alleged that the wires of the Charleston Consolidated Railway, Gas and Electric Company, from which the fatal current was transmitted to the telephone wire, "were defectively, insufficiently, carelessly and negligently insulated, and the said defendant, its agents and servants, were well aware of said want of insulation, or could have been aware of the same by the exercise of proper diligence."

The Charleston Consolidated Railway, Gas and Electric Company interposed the following demurrer to the complaint: "That the same does not state facts sufficient to constitute a cause of action against the defendant, Charleston Consolidated Railway, Gas and Electric Company, in that there is no allegation in the complaint, either that the said Charleston Consolidated Railway, Gas and Electric Company had notice of the fact wire of the Gordon Telephone Company had broken and crossed one of its wires between Meeting and Anson streets,

or that sufficient length of time had elapsed after the breaking of the said wire and the falling of the same over the wire of his defendant for the same to have been discovered by the Charleston Consolidated Railway, Gas and Electric Company, by due diligence or proper care."

From an order overruling the demurrer, the Charleston Consolidated Railway, Gas and Electric Company appeals.

307 By the demurrer, appellant, in effect, submits to the court this proposition: Admitting that the wires of the Charleston Consolidated Railway, Gas and Electric Company were strung below the telephone wires, and "defectively, insufficiently, carelessly and negligently insulated," and that that fact was known to the Charleston Consolidated Railway, Gas and Electric Company, or could have been known to it by the exercise of proper diligence, yet that company, as a matter of law, would be exempt from liability for death of a pedestrian who without fault came in contact with a telephone wire which had fallen across the negligently insulated wire, and received the deadly charge from it, unless the Charleston Consolidated Railway, Gas and Electric Company had notice that the telephone wire had fallen across its wire to the street, or a sufficient length of time had elapsed after the fall and contact for the company to discover it by the exercise of due diligence.

The extent to which wires conveying deadly electric currents should be insulated or otherwise guarded must be decided by the jury under the facts of each case. No rule of law can be laid down on the subject: *Bridger v. Asheville etc. R. R. Co.*, 25 S. C. 24.

The rule as to the degree of care in the use of electricity is the same as in the use of steam and other agencies—the care must be proportionate to the danger. In determining the danger, it is the duty of those in control to have in view all the surroundings, including the contiguity of other wires and their liability to fall and come in contact with the dangerously charged wire. As said by the supreme court of New Jersey in *Anderson v. Jersey City Electric Light Co.*, 63 N. J. L. 387, 43 Atl. 655: "Care, in this sense, means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies." The failure to adopt all usual appliances and methods to prevent contact and hurtful discharge of the current through another wire, is a breach of duty to the public. This view is supported by the almost unbroken current of authority: *City Electric* 308 Street

Ry. Co. v. Osmer, 61 Ark. 381, 54 Am. Rep. 262, 34 S. W. 89, 31 L. R. A. 570; Huber v. La Crosse City Ry. Co., 92 Wis. 636, 53 Am. St. Rep. 940, 66 N. W. 708, 31 L. R. A. 583; McKay v. Southern Bell etc. Tel. Co., 111 Ala. 337, 56 Am. St. Rep. 59, 19 South. 695, 31 L. R. A. 589, and extended note to these cases; Electric Ry. Co. v. Shelton, 89 Tenn. 423, 24 Am. St. Rep. 614, 14 S. W. 563; Anderson v. Jersey City Electric Light Co., 63 N. J. L. 357, 43 Atl. 654; Perham v. Portland General Electric Co., 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 40 L. R. A. 794; Kaplan v. Boston Gas Co., 177 Mass. 15, 58 N. E. 183.

Hence when the plaintiff states that the discharge of the final current from the appellant's heavily charged wire through the telephone wire was due to defective and negligent insulation, a good cause of action is stated.

Having held that a good cause of action is stated against appellant without regard to its actual knowledge of the fallen wire or its diligence in discovering it, it follows that the demurrer cannot be sustained.

The judgment of this court is, that the judgment of the circuit court be affirmed.

The Duty and Liability of Electric corporations in respect to their wires will be found discussed at length in the recent note to *Hebert v. Lake Charles Ice etc. Co.*, 170 Am. St. Rep. 515. At pages 530-534 in this note this question is considered in its application to parallel and intersecting wires of the different corporations.

SOUTH CAROLINA LOAN AND TRUST COMPANY v. LAWTON.

(99 S. C. 345, 48 S. E. 232.)

HUSBAND AND WIFE—Antenuptial Contracts fixing the property rights of children of the marriage cannot be altered by the husband and wife after the contract has become fully executed by the marriage. 2 S. W. 2d.

HUSBAND AND WIFE—Antenuptial Contracts.—The parties to an antenuptial contract may change it at will before their marriage and may, by another agreement, change the property rights of the children of the marriage as fixed by the first contract, and provide for the payment of the debts of the intended husband then in existence. 2 S. W. 2d.

HUSBAND AND WIFE—Antenuptial Trust Deed.—Enforceable and may enforce his debt reduced to judgment and levy of such debt under execution by an application to a

court of equity for the sale of property conveyed by an antenuptial trust deed to secure such debt executed after the debt was contracted and before the marriage of the parties thereto. (p. 806.)

W. St. J. Jervey, for the appellant.

Buist & Buist, for the appellee.

246 WOODS, J. The defendant, Ralph W. Lawton, was a member of the firm of L. W. Bicaise & Co. The plaintiff recovered judgment against the firm, and the sheriff made a return of nulla bona on the execution. Thereupon this action was commenced by the plaintiff against Ralph W. Lawton, Louise J. Lawton, his wife, and Grace L. Lawton, their infant child, for the purpose of subjecting to sale for the payment of the judgment of the plaintiff a lot of land held by Ralph W. Lawton, as trustee, under a declaration of trust or marriage settlement executed by him previous to and in consideration of the marriage. The plaintiff's suit is "in behalf of itself and all other creditors of the defendant, Ralph W. Lawton, either individually or by reason of his being a member of the late copartnership of L. W. Bicaise & Co., who shall come in and seek relief by and contribute to the expenses of this proceeding."

Prior to October 14, 1898, the lot was the individual property of Ralph W. Lawton, and was, of course, subject to his debts.

The marriage settlement was executed on October 14, 1898, and provided that Ralph W. Lawton should hold the property, free from his own debts, in trust for the benefit of Louise J. Buhre, who was to become his wife, for her life, and after her death for the children born to them who might survive the wife, the child or children of any deceased child to take the share the parent would have taken if living. The other details of the trust are not involved.

A creditor of Bicaise & Co. having discovered from the **247** record the existence of the marriage settlement, threatened to attack it for fraud. At the instance of this creditor, Lawton and Miss Buhre, before their marriage, executed and had placed on record an instrument of writing, dated October 20, 1898, and directed "to all unto whom these presents shall come or whom the same shall in any wise concern," in which, after reciting the declaration of trust of October 14, 1898, they continue:

"And whereas said declaration of trust was made, executed and delivered by the said Ralph W. Lawton and accepted by

the said Louise J. Buhre with the understanding and agreement that such declaration of trust was not intended to affect or interfere with any of the rights of any of the existing creditors of Ralph W. Lawton, either individual or by reason of his being a member of the copartnership of L. W. Bicaise & Co.

"Now, therefore, these presents witness, that we, the said Ralph W. Lawton and Louise J. Buhre, parties to said declaration of trust, do hereby declare and make it known that said declaration of trust and all the rights and interests which have accrued or are to accrue thereunder are subject to the rights of the creditors of the said Ralph W. Lawton, either individual or as a member of the firm of L. W. Bicaise & Co., which now exist or which may thereafter continue to be kept in existence by the renewal of any such obligations, provided that the original obligations are existent at the present time."

The marriage occurred several months after the execution of this paper. The debt to the plaintiff was owing by Bicaise & Co., when the marriage settlement was made.

The circuit judge upon these facts, ordered the land sold for the payment of plaintiff's debt, unless the defendants should themselves make payment by the date fixed for the sale. The decree contains other provisions, but none of them are involved in this appeal.

The defendants first insist that the land cannot be subjected to the payment of the debt, under the terms of the ³⁴⁸ second instrument, because the infant, Grace L. Lawton, acquired under the first instrument rights in the land free from the claims of creditors which could not be affected by the second instrument.

The principle is very clear upon reason and it is upheld by many authorities, that a marriage contract fixing the property rights of children of the marriage cannot be altered by the husband and wife after the contract has become fully executed by the marriage: *Fearne on Remainders*, 107; *Tabb v. Archer*, 3 Hen. & M. (Va.) 398, 3 Am. Dec. 657; *Gorin v. Gordon*, 38 Miss. 205, 19 Am. & Eng. Ency. of Law, 1229.

On the other hand, a somewhat careful search fails to disclose a single case in which it has been held that the parties to an antenuptial contract may not change it at will before the marriage. Until the marriage takes place, the contract is void. It is made in contemplation of marriage, and if marriage never occurs, the paper never comes into force. subject to alteration at any time before marriage, because

it is not until that event that the execution of the contract is complete. The law is thus laid down in *Fearne on Remainders*, 107: "Lord Talbot, however, in a subsequent case, adopted the distinction urged by Mr. Vernon in that of *Burton v. Hastings*; and laid it down as a rule, that where articles are entered into before marriage, and a settlement made after marriage, different from those articles (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail), the court will set up the articles against the settlement; but where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles, will be taken as a new agreement between them, and shall control the articles.

"The court will not interfere if both articles and settlement are made before marriage, unless the settlement in that case be expressed to be made in pursuance of the articles; for the court will suppose that the parties had altered their intention, with respect to the terms of the marriage, which ³⁴⁹ they may do before the marriage, though not afterward; and that the settlement was made in pursuance of such new agreement, and not of the articles."

We think it is quite clear that Ralph W. Lawton and Louise J. Buhre could alter the terms of the marriage contract concerning the property prior to their marriage, for the reason that until that event the prospective issue could acquire no rights in the property under the settlement.

The next question is: Did the parties so alter the settlement before marriage as to make the property subject to the debts then outstanding against Lawton? The second instrument was clearly intended as a correction and modification of the first, so as to make it express the real purpose of the parties. So corrected, the declaration of trust made by Lawton in favor of his wife and children must be read, when it came into force by the marriage, as containing an express proviso that the provision for his wife and children should be subject to the payment of his existing debts.

When this conclusion is reached, the question of fraud falls from the case. This question would have been vital, if the rights of creditors had not been preserved by the change in the terms of the marriage settlement. Reading the two papers as one coming into effect with the marriage, it is manifest there was no wrong done to creditors. In this view the question whether Bicaise & Co. was solvent when the marriage settlement went into effect is also unimportant.

It is insisted, however, on behalf of Mrs. Lawton, that there was no consideration for the second paper to which she was a party. It follows from the views already expressed, that no other consideration than marriage was necessary to the second instrument modifying the first. There is not complete execution of such instruments until actual marriage, and it does not matter how many changes may be made and how many different instruments may be signed, the settlement in the last form it assumes before marriage is the real contract supported by the consideration of marriage.

250 The defendants' position that the plaintiff's only remedy was to have the sheriff enforce payment by sale of the land embraced in the marriage settlement under his execution, cannot be sustained. When the trust was declared, the plaintiff had no judgment, and hence no lien on the property. It has since recovered judgment, and its effort to enforce the execution has resulted in a return of nulla bona. In these circumstances, it was proper to seek the aid of the court of equity to enforce its rights under the terms of the marriage settlement.

The judgment of this court is, that the judgment of the circuit court be affirmed.

Antenuptial Contracts and marriage settlements are discussed in the note to *Merritt v. Scott*, 50 Am. Dec. 371-375. Children of the marriage are considered as purchasers by virtue of marriage articles; and after marriage their rights cannot be affected by either of the parties to the articles: *Tubb v. Archer*, 3 Hen. & M. 399, 3 Am. Dec. 657.

LEWIS v. VIRGINIA-CAROLINA CHEMICAL COMPANY.

[69 S. C. 364, 48 S. E. 280.]

LANDLORD AND TENANT—Mining Lease—Right to Take Timber.—A lease to mine phosphate rock and as incident thereto, to build railroads and tramways, and to use the timber on the land for the construction of the superstructure thereof, and to cut and use all the fuel proper for the use of the machinery and employes of the mining lessee, including fuel necessary for washing rock, but not including the right to cut wood or timber for market, does not include right to use timber cut from the land in the construction of bridges and structures upon the land other than railroads or tramways although they are necessary to carry out the object of the lease. (17, 808.)

LANDLORD AND TENANT—Technical Violation of Lease—of Damages.—If a tenant in good faith and under a mistake commits a technical violation of his lease by cutting timber

from the land which is put into buildings constructed and left on the premises, the measure of damages against him is the value of the timber cut, in the stump, and interest from the time of appropriation. (p. 809.)

Mitchell & Smith, for the appellant.

C. Inglesby and Burke & Erckmann, for the appellee.

³⁰⁵ JONES, J. The plaintiffs, as heirs at law of George F. Lewis, deceased, lessor, brought this action against the defendant, lessee of certain lands in Charleston county, let for the purpose of mining phosphate and phosphatic deposits, to restrain further waste in cutting timber therefrom for purposes not authorized by the lease, and for damages and account for the value of timber already cut, including profits thereon. The decree of the circuit court adjudged the defendant pay plaintiffs one hundred and seventy-two dollars, the value of six hundred and eighty-eight cords of wood, at twenty-five cents per cord, from trees unlawfully cut, and also for four hundred and fifty-eight thousand five hundred and twenty-four feet of lumber, at the rate of nine dollars per thousand feet, less the value added thereto by cutting, hauling, sawing and handling the same, with interest from April 1, 1900, and to this end it was referred to the master to take testimony.

The principal questions raised by the exceptions are: 1. As to the construction of the lease; 2. As to the measure of damages.

The lease, after granting right to dig and mine upon the land described for phosphate rock and other minerals for the term of five years, provided: "And as incident to the said mining right, to locate, construct and operate one or more lines of railroads or tramways upon the said land, together with the right to cut and use the timber ³⁰⁶ on the said land for the construction of the superstructure of such railroads or tramways. Also the right to cut and use all the fuel proper for the use of the machinery and employes of the said lessee mining the land, including such fuel as may be necessary for washing and otherwise preparing the rock thereon mined for market (but not the right to cut wood or timber for market)—the term of five years herein provided to be contingent upon the available supply of phosphate and phosphatic deposit not being sooner exhausted."

The timber cut and used by defendant for which account was decreed was used in the construction of buildings and structures upon the land, other than railroads or tramways, but necessary to

carry out the object of the mining lease, and defendant contends that a proper construction of the lease, in view of all the circumstances, authorized such use of the timber. It is doubtless true that, by implication, the lease authorized the erection on the land of all structures necessary to carry out the purpose of the lease, but it does not follow that defendant was thereby authorized to use plaintiff's timber for such purpose, especially when the lease expressly declares for what purpose timber may be used. It is contended that the words in parentheses, "but not the right to cut wood or timber for market," were added to completely cover all conditions of restriction on the use of the timber for mining purposes, and emphasize the right of the lessee to use timber for necessary mining purposes, subject only to the restriction that the wood or timber be cut or sold for market. We do not think, however, that these words can be construed to have such effect, as that would annul the other words expressly restricting the use of the timber. These words may have been added merely to emphasize a particular restriction, and not to enlarge the grant, as held by the circuit court, or they may have been inserted to prevent the possibility of a construction which would permit defendant to sell or exchange the timber it would otherwise consume in fuel for an equivalent amount in coal or other fuel ³⁶⁷ material. We agree with the circuit court that the lease did not authorize the use of the timber except in the superstructure of the railroads or tramways and the specified fuel purposes.

The circuit court has found, however, that the defendant cut the timber in perfect good faith that it had the right to do so. It also appears as a fact undisputed that the greater portion of the lumber in question was used upon the premises in the erection of buildings and other structures worth twenty thousand dollars, which, under the terms of the lease, were left upon the premises on its termination. The defendant found a dismantled mining property, so far as buildings were concerned, and left it in good condition for future occupancy. It also appears that defendant used coal for fuel instead of wood, and that by actual computation it consumed for all purposes less timber than would have been destroyed had it used timber instead of coal

1. These facts came near to establishing a case of melioraste exempting from damages, as the injury to the in- by the unauthorized destruction of timber is more than he saving of timber in other respects, and by the use or cut on the premises in its permanent improvement.

But the buildings were to become the property of plaintiffs, without regard to where the lumber came from, and the use of the timber was expressly restricted to the purposes named; so that it was a technical violation of plaintiffs' right to cut and use the timber for an unauthorized purpose, and plaintiffs are entitled to compensation. What should be the measure of damages? The circuit court correctly decided that the rule stated in *State v. Pacific Guano Co.*, 22 S. C. 60, 87, was applicable. In that case it was held that where a trespass is committed under an honest but mistaken belief of right, the measure of damage is the property, less the amount which the trespass has added to its value by its removal and preparation for market. That was a case of an unlawful digging and conversion of phosphate rock under ^{see} an honest mistake of right. In practically applying the rule stated, the court, in *State v. Pacific Guano Co.*, 22 S. C. 60, decreed that the defendant should be liable for the value of the phosphate rock "in its natural state and position." By analogy the measure of damages in this case should be the value of the timber on the stump, as it was in its natural state and position. This may be ascertained by starting and ending with the value on the stump, as the simplest and most direct way. If, however, in trying to arrive at such value, we start with the market value of the lumber at the mill, we should be careful to deduct, not simply the cost of converting the timber into lumber, but the value added to the value of the timber on the stump, by the time, skill, labor and expenditures employed in the process of manufacture. If, therefore, the market value of the lumber at the mill includes any profits of manufacturing, such profits must be deducted, otherwise you would give the plaintiffs not only the value of the timber on the stump, but in addition thereto, the profits of manufacture which enter as an element of market value under normal conditions. The circuit court misapplied the rule in *State v. Pacific Guano Co.*, 22 S. C. 60, in requiring defendant to pay the value of the timber on the stump, and the profit of converting the timber into lumber.

This is not a case to reclaim property improved by another, in which, in order to give the owner his own, it may be necessary to give him also what an inadvertent trespasser has added to it. This case is peculiar in this, that plaintiffs already have the property, taken and improved by defendant in the buildings into which it was converted. The case is one calling for the lightest measure of damages which the law will allow, and it

should not exceed the value of the timber on the stump, with interest from time of appropriation or cutting. It is not suggested that the land was otherwise injured than by the mere taking of the timber.

There was testimony as to the value of the timber on the stump, but as the circuit court has made no finding on that point, we prefer not to go into that matter until the circuit ^{and} court shall have passed upon it, either upon the testimony now in or such additional testimony as may be offered thereon by order of the circuit court.

We are not fully satisfied with the finding of fact by the circuit court that the value of the lumber at the mill was nine dollars per thousand feet, nor with the finding that defendant should be liable for one hundred and seventy-two dollars, as value of cordwood also obtainable from trees cut and sawn into lumber. It may be that in estimating the value of the timber on the stump it is customary to take into consideration the parts of the trees not converted into lumber. In order, therefore, to leave the inquiry as to the value of the timber on the stump unembarrassed by these findings, we reverse them.

There was argument in this case as if we had under consideration here an appeal from a temporary order of injunction granted by the circuit court. As to that, Judge Purdy, in his charge said "a temporary injunction was granted and an appeal was taken by defendant, but having ceased to cut the timber, and the time of the lease having expired thereafter, it seems that really there was nothing to be gained by the appeal, and it was not carried on." We do not regard the brief before us as showing an appeal from an order of injunction, nor do we deem the matter of any importance at this stage of the case and under the circumstances stated.

The judgment of the circuit court is modified in the particulars mentioned, and the case is remanded for further proceedings in accordance with the views herein announced.

The Measure of Damages when, through an inadvertent trespass, timber is cut, is usually regarded as the value of the timber immediately after being severed from the land, with interest and compensation for any injury to the land: *Chappell v. Puget Sound Reduction Co.*, 27 Wash. 63, 91 Am. St. Rep. 820, and cases cited in the cross-reference note thereto. See, too, *Ivy Coal etc. Co. v. Alabama Coal Co.*, 135 Ala. 579, 93 Am. St. Rep. 46.

MITCHELL v. LEECH.

[69 S. C. 413, 48 S. E. 290.]

BENEFIT SOCIETIES—Principal and Agent.—Subordinate lodges of a mutual benefit society are the agents of the supreme lodge for whose acts within the scope of their authority the latter is liable, if the supreme lodge organizes and selects such subordinate lodges to transact its business under its complete control, and the members of the subordinate lodges are, to all intents and purposes, members of the supreme lodge. (p. 816.)

BENEFIT SOCIETIES—Liability for Injury During Initiation. The supreme lodge of a mutual benefit society authorizing a subordinate lodge as its agent to initiate members into the order, is liable for injury inflicted upon a candidate for membership by the use of a mechanical goat during such initiation, although the use of such contrivance is not authorized by the supreme lodge. (p. 817.)

TRIAL—Instructions.—Although the court errs in not construing writings in evidence and in leaving their construction for the jury, the error is not prejudicial to the defendant, if the charge gives the jury opportunity of finding against plaintiff upon a question of fact concerning such construction, and the construction found by the jury is the proper one. (p. 817.)

WITNESSES—Experts—Contradiction.—The opinion of an expert witness as testified to cannot be contradicted by showing that a certain author is or is not standard, or by what he has said upon the subject under examination. (p. 818.)

WITNESSES—Expert.—An expert witness may state his opinion when in response to an objection that he is consulting authorities, the court instructs him to tell what he knows, what his experience has been, and what his opinion is. (p. 818.)

D. E. Finley, J. S. Brice and H. C. Brome, for the appellant.

G. W. S. Hart and J. S. Hart, for the appellee.

⁴¹⁴ **GARY, J.** This is an action for damages sustained by the plaintiff, on the night of his initiation into a subordinate camp of Woodmen of the World, in consequence of the use of a mechanical goat. The jury rendered a verdict in favor of the plaintiff for one thousand dollars.

The assignments of error are as follows:

"1. Because it is respectfully submitted that his honor, the presiding judge, erred as a matter of law in charging the jury as follows: 'Now, it is argued here by the plaintiff that the subordinate camp is a constituent part of the Sovereign Camp. Now, that is matter of fact for you to find from the testimony, whether it is or not. That involves a different principle than the principle involved in mere agency. If the subordinate camp is a constituent part of the Sovereign Camp, if you find

that the subordinate camp is a part of it, then the act of the subordinate camp is the act of the Sovereign Camp, that is, the act of one and the same party—thus leaving it to the jury to interpret the written instruments offered in evidence in view of the relation existing between the Sovereign Camp and the subordinate camps were fully set forth, to wit, the articles of incorporation of the Sovereign Camp, the constitution and laws of the order and the insurance policy issued by the Sovereign Camp to the members of the subordinate camps.

"2. Because his honor erred as a matter of law in construing the articles of incorporation, the constitution and laws of the order and the insurance policy issued by the Sovereign Camp to the members of the subordinate camp as to whether or not the subordinate camp was a constituent part of the Sovereign Camp, instead of leaving it to the jury to determine as a question of fact what that relation was.

"3. Because his honor erred in leaving it to the jury to construe the articles of incorporation, the constitution and by-laws of the order, the ritual of the order and the insurance policy issued by the order—all of which were written instruments, and to determine as a question of fact whether or not the subordinate camp was a constituent part of the Sovereign Camp.

"4. Because his honor erred as a matter of law in refusing to charge the jury, 'If you find from the evidence that the defendant, Sovereign Camp Woodmen of the World, is a fraternal beneficiary association, having power only to collect assessments and dues from its members, to pay death benefits for the erection of monuments and the payment of the ultimate expenses of the management of its business, then you are instructed that the plaintiff is conclusively presumed to have known at the time of his initiation as a member of a local camp at Hickory Grove, that the defendant, Sovereign Camp of the Woodmen of the World, was not liable for the acts of the local camp, or its members, and your verdict should be for the defendant, Sovereign Camp.'

"5. Because his honor erred as a matter of law in refusing to charge the jury as follows: 'Our law does not go so far as to require a case like that that the plaintiff should be conclusively presumed to have known that the parent camp, I will call it the Sovereign Camp would not be liable for its torts. That is a question of fact for you to find'—thus leaving it to the jury to construe the articles of incorporation, the constitution and

laws of the Sovereign Camp, the ritual furnished by the Sovereign Camp, and the insurance policy issued by the Sovereign Camp—all of which were written instruments, and determine as a question of fact whether or not the Sovereign Camp was liable for the torts of the members of the subordinate camp.

416 "6. Because his honor erred in not instructing the jury that the written instruments in evidence above referred to showed that the Sovereign Camp was not liable for the torts of members of the subordinate camps.

"7. Because his honor erred in refusing defendant's motion for a new trial upon the grounds that the verdict was contrary to the weight of the testimony, and upon the further grounds that his honor had erred in leaving to the jury to decide as a matter of fact, whether or not the subordinate camp was a constituent part of the Sovereign Camp and whether or not the Sovereign Camp was liable for the torts of the members of the subordinate camp, and in not construing the articles of incorporation, constitution and by-laws and insurance policy.

"8. Because the verdict against the defendant, Sovereign Camp, was contrary to law and evidence, in that it being admitted that there was nothing in the initiatory exercises prescribed and required by the Sovereign Camp that required the use of a mechanical goat, and that the plaintiff, if injured at all, was injured while riding a mechanical goat, the Sovereign Camp was in no way liable for such injury.

"9. Because the verdict was contrary to the law, in that it holds the Sovereign Camp liable for the torts of the members of the subordinate camp.

"10. Because the verdict was contrary to the law and the evidence in that the evidence showed that the defendant was not injured, as alleged, while being initiated into the order of the Woodmen of the World.

"11. Because his honor erred in refusing to allow defendant's counsel to ask Dr. J. D. McDowell, an expert witness for plaintiff, 'if Lydson was a standard medical work on genito-urinary and venereal and sexual diseases,' and his honor further erred in not allowing defendant's counsel to read extracts from said work and ask said witness if said statements were true.

"12. Because his honor further erred in not allowing defendant's counsel to ask Dr. W. M. Love, an expert witness 417 for defendant, if certain medical works were standard and good authority, and his honor further erred in refusing to

allow defendant's counsel to ask said witness if certain statements in medical works were true, and, also, in refusing to allow defendant's counsel to ask Dr. M. J. Walker, a witness for plaintiff, the same question."

We will first construe the instruments in writing introduced in evidence, for the purpose of ascertaining the relation the Sovereign Camp of the Woodmen of the World, the subordinate camps, and the members sustained toward each other. In the amended and substituted articles of incorporation of the Sovereign Camp of the Woodmen of the World, are the following:

"Article I. The name of this corporation is 'Sovereign Camp of the Woodmen of the World,' and its principal office and place of business shall be in the city of Omaha and state of Nebraska.

"Article II. This corporation is and shall be a fraternal beneficiary association, formed and carried on for the sole benefit of its members and their beneficiaries, and not for profit. It has and shall continue to have a lodge system, with ritualistic form of work and representative form of government.

"Article III. The object for which this corporation was formed and its plan of doing business are and shall be to combine white male persons between the ages of eighteen and fifty-five, of sound bodily health, and exemplary habits and good moral character, who shall be required to pass a satisfactory medical examination, into a secret, fraternal, beneficiary and benevolent order, to provide funds derived from beneficiary calls, assessments and dues collected from its members for the payment of the expenses of conducting the business thereof, and to create a fund to be paid to beneficiaries on the death of a beneficiary member, and to erect a monument at the grave of each deceased beneficiary member, and for such other purposes as the corporation may from time to time determine, not prohibited by the laws of the state of Nebraska.

⁴¹⁸ "Article IV. This corporation shall have power through its Sovereign Camp and Executive Council, to provide a constitution and laws, by-laws, rules and regulations for its own government and that of its camps and members, and to alter and amend its constitution, laws, by-laws, rules and regulations at any session of the Sovereign Camp or Sovereign Executive Council. The constitution and laws, by-laws, rules and regulations now in force shall continue in force and effect until altered, amended or repealed. It shall have power to purchase

and hold such real and personal property as shall be necessary for its convenience and use, and may sell, transfer or dispose of the same as it may deem necessary. It shall have power to levy assessments and dues on all its members, to fix the amount thereof and the manner of collecting the same. It may contract for the purchase and sale of supplies, paraphernalia, badges and other appliances used in the work and business of the order, and may do all other acts and things necessary to carry out the objects and purposes for which it is organized.

“Article V. . . . The Sovereign Camp shall have and may exercise full legislative power in all matters affecting its management and good of the order. It may provide for the suspension and expulsion of camps and members, for failure to pay assessments, dues or other demands of the Sovereign Camp, or its officers acting under the constitution and laws of the order, and for the violation of the constitution and laws of the order as they now exist or may hereafter be adopted.”

The constitution of the Sovereign Camp of the Woodmen of the World contains these sections:

“Name.

“Section 1. This corporation shall be known as ‘Sovereign Camp of the Woodmen of the World,’ and shall be composed of a Sovereign Camp, beneficiary head camps, convention head camps and camps with powers and duties as hereinafter defined.

419 “Powers.

“Sec. 2. The ‘Sovereign Camp’ shall have original and appellate jurisdiction in all matters pertaining to the general welfare of the order. It may entertain and determine charges against any of its members, and all other matters of controversy which may be brought to it on appeal from camps, head camps, convention head camps and the Sovereign Executive Council. . . . and its decision shall be final. It shall issue and may revoke charters to camps. . . . It shall have the power to enact laws for its own government, the government of its convention, head camps and camps, and for the control and management of the business of the order generally . . . and to provide penalties for the violation thereof. It shall have power to prescribe the rights, privileges, duties and responsibilities of itself, its camps and the members of the order, and to finally determine the same. It shall prepare and publish the rituals and ceremonies of the order, which shall not be altered, changed or amended. . . . It shall have the power to provide for the

levy and collection of assessments and dues on its members . . . necessary to pay all beneficiary claims and expenses of management, and shall have generally such powers and may perform such duties as it may deem wise for the welfare of the order and to establish the rights and perpetuity of the order. It shall be the sole judge of the election and qualification of its own officers and members and shall establish rules for their government, and may by itself or through its Sovereign Executive Council suspend or remove any officer or member for cause."

"Beneficiary Certificates.

"Sec. 52. All beneficiary certificates shall be issued in the name of 'Sovereign Camp of the Woodmen of the World,' and shall be signed by the sovereign commander and sovereign clerk, attested by the corporate seal. They shall be countersigned by the council commander and clerk of the camp, and shall not be issued for less than five hundred (\$500) dollars nor for more than three thousand (\$3,000) ⁴²⁰ dollars, and shall be in such form as shall be prescribed by the sovereign commander in conformity to the laws of the order."

"Sec. 81. Camps shall only have such powers as are given by the constitution and laws of the Sovereign Camp. They may adopt by-laws for their own government not inconsistent with the constitution and laws of the Sovereign Camp, but such by-laws must be submitted to and approved by the sovereign commander before taking effect."

There is nothing in the ritual of the order authorizing the use of a mechanical goat as part of the ceremony in the initiation of a member.

In order to accomplish the objects for which the Sovereign Camp was organized it was necessary from the very nature of the business to call to its assistance the services of persons through whom it might act, in transacting the affairs of the order in various localities. It selected and organized local lodges for the purpose of meeting this necessity. Not only the subordinate camps, but the members as well, were under the complete direction and control of the parent camp, in whose name the benefit certificates were required by the constitution to be issued; and when a member died, payment of the benefit certificate was to be made by the Sovereign Camp. These facts show that when a person was initiated in a local lodge, ~~he came, to the~~ intents and purposes, a member of the Sovereign Camp. They further show, under the authority

McKwell v. British-American Mortgage Co., 65 S. C. 118, 21 S. E. 395, that the subordinate camps were the agents of the Sovereign Camp. In the case just mentioned, the court uses the following language: "The business of the company was such as necessarily compelled it to rely upon the work of other parties, and this necessity usually and naturally gives rise to the employment of agents. When, therefore, this work is done by agents, there is a strong implication that they are the agents of the parties receiving the benefit of their services." Our conclusion that the subordinate lodge was the agent of the Sovereign Camp is in harmony with the cases of Supreme Lodge K. of P. v. Withers, 177 U. S. 260, 20 Sup. Ct. Rep. 611, 44 L. ed. 762, Murphy v. Independent Order of the Sons and Daughters of Jacob of America, 77 Miss. 830, 27 S. E. 624, 50 L. R. A. 111, and Bragaw v. Supreme Lodge L. & L. of Honor, 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602. As the subordinate lodges were the agents of the Sovereign Camp, the acts of the local camps were binding upon the parent camp if performed within the scope of the agency, even though not authorized by the Sovereign Camp.

The court in the case of Hutchison v. Real Estate Co., 65 S. C. 75, 43 S. E. 295, quotes with approval the following language from section 452 of Story on Agency: "It is a general doctrine of law that although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligences and other malfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies, respondeat superior, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings either directly with the principal or indirectly with him through the instrumentality of his agent. In each case the principal holds out his agent to be trusted, and thereby in effect he warrants his good conduct in all matters within the scope of the agency. To the same effect is the language of the Supreme Court, 5, 36 Am. Rep. 678. A presiding judge, should the same be introduced in evidence

not just stated but his failure to do so was not prejudicial to the defendant for his counsel gave the jury the opportunity of finding against the plaintiff upon a question of fact that should not have been submitted ~~and~~ to them. These views dispose of all the exceptions except those numbered eleven and twelve.

The eleventh exception will next be considered. The record shows that the question arose in the following manner: "Doctor, is Lyndon a standard medical work on genito-urinary and venereal and sexual diseases?" Mr. Hart: I object; medical books are not evidence; medical books are not evidence except in cases of insanity. Medical books are not evidence in cases of this character. Q. I will ask him if that is good authority? Mr. Hart: I object to that. Mr. Brice: This is an expert witness, and the witness had stated that the authorities, medical authorities, that is what the witness means, state that a man can have an injury so slight as not to be noticed at the time and yet serious results follow. I am not introducing the authority. I am simply asking him whether this is an authority. The Court: The object of the question is to introduce the book? Mr. Brice: I am simply going to ask him if this is an authority, and read him a piece and ask him if that is good authority or not. The Court: That introduces the book. You wish to contradict or qualify the opinion of the doctor on the stand. Otherwise it would be irrelevant. Testimony excluded. Exception taken." The presiding judge simply ruled that you could not contradict or qualify the opinion of the doctor on the stand by showing what some author had said. In this there was no error.

We proceed to consider the last exception. The question presented by this exception arose as follows: "Q. Doctor, which one of the testicles are these tubercular germs more likely to attack? A. Well, sir, the right testicle is more susceptible to tubercular diseases than the left. There has never been any logical reason given why it is the case. Q. But you state that to be the fact? A. Yes, sir; in eighty per cent, eight cases out of ten. Eight cases out of ten occur in the right testicle. Mr. Hart: You are giving your own experience, nothing that is recorded? A. It is an opinion based on what I have read, what I have seen. Q. That ~~422~~ is your opinion? A. It is an opinion based on what I have read. Mr. Hart: The witness is still referring to authorities. The Court: Just give your opinion. The witness says: Your honor, I don't know how to answer that. Your honor tells me not to answer that.

question, I will not do so. The Court: When they ask a question, tell what you know, what your experience has been, what your opinion is." This ruling was not erroneous, as it allowed the witness to state his opinion.

It is the judgment of this court that the judgment of the circuit court be affirmed.

In the Recent Case of Jumper v. Sovereign Camp of Woodmen, 127 Ill. 635, where an action was brought against the sovereign camp for personal injuries suffered by a candidate for membership during his initiation in the local camp, it was held that the plaintiff did not show, as between the sovereign and the local camp, such a relation of master and servant or of principal and agent as to render the sovereign camp responsible for the acts of the local camp. On the liability of a principal generally for the unauthorized acts of his agent, see the note to Franklin Fire Ins. Co. v. Bradford, 88 Am. St. Rep. 9-799.

GWYNN v. CITIZENS' TELEPHONE COMPANY.

[69 S. C. 434, 48 S. E. 460.]

TELEPHONE COMPANIES are Common Carriers. (p. 825.)

DAMAGES—Counterclaim.—Damages to defendant arising out of breach of contract may be set up as a counterclaim to a demand for damages, for a failure to furnish plaintiff with telephone connection. (pp. 825, 826.)

TELEPHONE COMPANIES—Monopoly.—A contract between a telephone company and a customer that the former will put in a telephone for the use of the latter on condition that he will not use another telephone system is void as in restraint of trade and against public policy as tending to create a monopoly. (p. 826.)

TELEPHONE COMPANIES—Damages for Failure to Render Service.—Failure to put in a telephone and furnish service at the request of a customer, as provided for by his contract, if caused by the overcrowded condition of the telephone company's business, is ground for a mitigation of damages, but is not a justification for a refusal to put in a telephone. (p. 826.)

TRIAL—Instructions.—A charge on the facts is reversible error. (p. 827.)

DAMAGES—Vindictive.—A tort committed by mistake in the assertion of a supposed right, or without any actual wrong intention and without recklessness or negligence, showing malice or a conscious disregard of the rights of others, does not warrant the giving of vindictive damages. (p. 827.)

Simpson & Bomar, for the appellant.

Sanders & DePass, for the appellee.

⁴³⁵ GARY, J. The complaint alleges that on or about the eighth day of February, 1900, the plaintiff applied to and

denied from the defendant the use of the Citizens' telephone in plaintiff's store in said city and for proper connections with all of defendant's subscribers, but that the defendant negligently and willfully failed and refused plaintiff the use of said telephone where plaintiff would consent to a provision against the joint use of the Bell telephone of the Southern Bell Telephone and Telegraph Company, which provision plaintiff refused to consent to.

That plaintiff was thereby deprived of the use of said telephone and was cut off from telephonic connection with many of its customers, who had said Citizens' phone only, thereby losing their custom and was otherwise injured, to the great annoyance, trouble, loss and damage of plaintiff in the sum of two thousand dollars.

The defendant denied the allegations of negligence and willfulness, and set up as a defense substantially the allegations which were also pleaded as a counterclaim. The defendant also alleged that at the time demand was made upon it, to put in another telephone for plaintiff its switchboard and lines were so crowded and there were so many demands upon it, that it could not at that time have complied with plaintiff's demands, even upon the terms upon which the original agreement was made.

The counterclaim was as follows: "For further answer to the complaint herein, and as and for a counterclaim against the plaintiff the defendant alleges that some time prior to February 8, 1900, the plaintiff, for value received, made and entered into a written contract with this defendant, whereby the plaintiff agreed in consideration of the low rate charged for the use of defendant's telephone and telephone service, that he would for five years from the date of said contract take and use the telephone and the service of this defendant exclusively in his place of business, and would not during the time of the existence of said contract use any other telephone in connection therewith. That for a time the plaintiff complied with the terms of the said contract, but that shortly before the said 8th of February, 1900, the said plaintiff willfully, wantonly and maliciously, and with the intention of causing injury to the defendant, rented and began the use of another telephone in his place of business, in violation of the terms of his said contract, and continued to rent and use the same, and willfully refused to comply with the terms of the said contract, all of which tended to the disorganization of the defendant's business, causing it great annoyance, incon-

venience and loss, and that because and by reason of the said acts and conduct of plaintiff, this defendant suffered damage in the sum of two thousand five hundred dollars, and for this sum defendant sets up a counterclaim herein."

The plaintiff moved to strike out the allegations of the answer on the ground that they were irrelevant and redundant, and interposed a demurrer to the counterclaim on the ground that it did not state facts sufficient to constitute a counterclaim. His honor, the presiding judge, ruled that the allegations set up as a defense should not be struck out, as they contained allegations properly to be considered by the jury in mitigation of damages. He sustained the demurrer to the counterclaim. ⁴³⁷ The jury rendered a verdict in favor of the plaintiff for four hundred dollars.

The defendant appealed upon the following exceptions:

"1. In holding that the portions of defendant's answer referred to in the plaintiff's notice to strike them out did not constitute a defense to this action, in that the defendant was a common carrier, and was bound upon demand to furnish the plaintiff a telephone, and having failed to do so, was liable for damages therefor; and that the previous failure of the plaintiff to keep his contract constituted no ground for the defendant's failure to furnish him a 'phone, and no ground in this action to defeat plaintiff's right to damages for such default of the defendant; when he should have held that the defendant, under the constitution and laws of the state of South Carolina, was not, and is not, a common carrier; and that it had the right, if plaintiff had failed to keep his contract with the defendant, to refuse further to furnish him one of its telephones.

"2. In holding that the portion of defendant's answer referred to in the plaintiff's demurrer thereto did not constitute a cause of action as a counterclaim against the plaintiff, and in sustaining the demurrer to that portion of the answer. (a) If the plaintiff had previously made a contract with the defendant and he had broken his contract, the defendant had a right of action against him for damages therefor. (b) Having such right of action against the plaintiff, the defendant had a right to set it up as a counterclaim in this action, as such cause of action arose out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, and was connected with the subject of the plaintiff's action.

"3. In holding that the plaintiff had the right to show by testimony that the defendant threatened to take the telephone

out of plaintiff's residence, when there was no allegation in the complaint to which this testimony was responsive, and in not sustaining the defendant's objection to the plaintiff's testimony with reference thereto.

"4. In holding that the defendant did not have the right to ⁴²⁸ show by the evidence in justification of its contract with the plaintiff and others for the exclusive use of its telephones, the kind and character of the competition it then had with the Bell Telephone Company, and the financial strength of said company and in sustaining the plaintiff's objection to the testimony of H. B. Carlisle, one of the directors of the defendant company, with reference to this matter.

"5. In holding that the defendant did not have the right to show by testimony in support of the allegation in its answer that it did not have the means to supply telephones to the plaintiff and others then desirous of using them—that other persons besides the plaintiff were unable to get instruments from the defendant at that time for that reason—and in sustaining the plaintiff's objection to the testimony of J. R. Bain tending to show these facts.

"6. In not sustaining the defendant's motion for a nonsuit on the grounds upon which it was based, to wit: (a) That so far as compensatory damages were concerned, there was no evidence tending to show that the plaintiff had suffered any damage or loss whatsoever in the matters complained of in the complaint. (b) That so far as vindictive damages were concerned, there was no evidence tending to show that the defendant had been guilty of any malicious, willful or wanton conduct in refusing the use of one of its telephones to the plaintiff. For these reasons, the defendant insisted upon its motion for a nonsuit, and insists here that it was error for the circuit judge to refuse it.

"7. In charging the jury that it was utterly immaterial, so far as actual defenses or justification was concerned, whether the plaintiff, Gwynn, had broken his contract or not, as such conduct upon his part was no justification for the refusal of the defendant to further furnish one of its telephones, but that the defendant was a common carrier, and was bound to furnish such telephones, irrespective of plaintiff's previous conduct; when we submit he should have charged the jury that the defendant was not a common carrier, and had the legal right to furnish its instruments to or to withhold them ⁴²⁹ from the plaintiff or any other persons at its will and pleasure. In this connection

defendant alleges error: (a) In charging plaintiff's first request to charge, 'that a telephone company incorporated under the laws of this state for the purpose of transmitting intelligence for the use of the public, is a common carrier of intelligence'; (b) And in charging his second request to charge, 'that a common carrier of intelligence, such as a telephone company, is bound under the law to furnish a citizen the use of one of its telephones within a reasonable time after the pay for such use is tendered and demand made upon it for such telephone.'

"8. In charging the jury, as requested by the plaintiff's fifth request to charge, as follows: 'If a telephone company intentionally does an act with an intent to deprive a citizen of the right to use one of its telephones after tender of pay and demand upon it for such use, then such company is guilty of such willfulness or wantonness as would warrant a verdict against it for vindictive or punitive damages,' the error being: (a) That such instruction was a charge upon the facts, in violation of the constitution of the state of South Carolina, in that it took away from the jury the question whether the refusal to furnish the telephone in this case was or was not such willfulness or wantonness as would warrant a verdict for punitive damages—if such refusal was with the intent to deprive the plaintiff of the right to use such telephone; (b) That for the defendant to refuse the use of one of its telephones to the plaintiff under the belief that it had a legal right to do so, and for the sole purpose of protecting its own rights, would not be such willfulness or wantonness as would warrant a verdict for punitive damages, even though such act on its part was with an intent to deprive the plaintiff of its telephone—that is to say, to exercise its legal right to withhold such telephones from him. Willfulness and wantonness which would warrant a verdict for punitive damages must include some element of intent to deprive another of a right or do him a wrong, knowing that he had the right, or knowing that it was a wrong, and must ⁴⁴⁰ be something more than the mere assertion by one of what is conceived to be his legal right.

"9. In charging the jury as follows: 'Now, from what I have said, you see that every citizen has a right to the use of a common carrier of intelligence, upon showing a willingness to comply with the terms required with everyone else, such use and privilege must be given him, and if it is not, he has a cause of action against the common carrier, in which action he may recover compensatory damages; and if it is done willfully and maliciously, then, in addition to compensatory damages, vindictive and

punitive damages. If the common carrier has had a financial loss and cannot carry out its obligations to the public, the public are not concerned whether the corporation is in straits. Therefore, the law says you carry in accordance with the requirements of the law. That is no excuse; you must carry all alike, and if it willfully and maliciously refuses to do so, then it is liable for vindictive damages. If it holds itself out as a common carrier, exercises the right of a common carrier, the law says the duty upon it is not whether you are poor or whether you are rich, or whether your stock is worth thirty cents or one hundred dollars, that is not it; the law says that it does not affect the responsibility to the party; as long as they are common carriers, they are responsible for their obligations to carry all alike. If it be in a financial strait, it might come in as mitigation, but not in justification, nor is it a defense, as long as they are exercising the rights of a common carrier, and take obligations upon themselves, benefits and burdens coming together, they hold themselves out to the public, the law says is a common carrier, and, therefore, persons had a right to consider it a common carrier, and they must carry as required by the law, fulfilling their obligations just as an ordinary citizen, the same obligations rest upon him to carry out his obligations. It may repel the idea of willfulness, wantonness or maliciousness by showing its condition; but so long as it holds itself out as a common carrier, it must discharge the obligations of a common carrier, and treat all alike.' The error ⁴⁴¹ being: (a) This instruction to the jury took away from the jury and utterly destroyed the defendant's defense, that at the time the demand was made upon it by the plaintiff for one of its telephones, the financial condition of the defendant and the physical condition of its plant was such that the defendant was utterly unable, even if it had been so disposed, to furnish such instrument to the plaintiff; (b) That even if, under the law, the defendant was a common carrier and was bound to treat all its patrons alike, it had the right, if its financial and physical condition was such to demand it, to refuse the use of the telephone to the plaintiff or any other person, and this instruction to the jury took away from the defendant the right to show that such was its condition, was one of the reasons why the telephone was not furnished to the plaintiff when demanded; (c) The charge quoted was, we submit, in conflict with the decision of the supreme court in the case of *State ex rel. J. B. Gwynn v. Citizens' Telephone Co.*, 61 C. 83, 85 Am. St. Rep. 870, 39 S. E. 257, 55 L. R. A. 139,

in which case, under the opinion of the supreme court, the defendant had the right, if it could, to justify its refusal to furnish a telephone, by showing that it was unable to do so.

"10. Because the circuit judge erred in refusing the motion for a new trial on the grounds upon which such motion was based, and in finding and holding in connection with such motion as follows: (a) That after the decision of the supreme court in the case of *State ex rel. J. B. Gwynn v. Citizens' Telephone Co.*, 61 S. C. 83, 85 Am. St. Rep. 870, 39 S. E. 257, 55 L. R. A. 139, the law in relation to the questions involved in this litigation was settled, and that such decision settled all issues in this action, and deprived the defendant of the right to make any defense thereto other than to show what facts it could in mitigation of plaintiff's damages; (b) That the defendant set up and had no real defense to this action, when he should have held that the defendant had the right to establish, and did establish, by the great preponderance of the evidence, a complete defense thereto in the following respects: That no actual damage whatsoever was suffered by the plaintiff, and, therefore, ⁴⁴² the verdict should have been in favor of the defendant as to actual damages. That no willful or malicious conduct was shown, and, therefore, the verdict should have been in favor of the defendant as to vindictive damages. That, in addition to all its other defenses, the defendant was utterly unable at the time the demand was made upon it to furnish to the plaintiff the telephone as demanded, and, therefore, the verdict should have been in favor of the defendant. The appellant submits: That the verdict of the jury in respect to these matters of defense was not only against the great weight of the testimony, but was without any evidence to sustain it, and, therefore, the refusal of the circuit judge to grant a new trial was error of law."

The first exception is disposed of by the case of *State ex rel. Gwynn v. Citizens' Telephone Co.*, 61 S. C. 83, 85 Am. St. Rep. 870, 39 S. E. 257, 55 L. R. A. 139. Permission was granted the appellant to review this case, but this court sees no satisfactory reason for receding from the principles therein announced.

In passing upon the second exception, we will first consider whether the counterclaim was obnoxious to section 171 of the Code, which permits a counterclaim when it arises out of one of the following causes of action: "1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the sub-

ject of the action." The counterclaim unquestionably was connected with the subject matter of the action, for it was the foundation upon which the defendant based its refusal to allow the plaintiff the further use of the telephone.

We will next consider whether the contract alleged in the counterclaim was void on the ground that it was in restraint of trade and against public policy. The modern doctrine is that contracts between individuals are not void on the ground that they are in restraint of trade, unless the provisions thereof are unreasonable: 24 Encyclopedia of Law, 850. But, as is said in 9 Cyclopaedia, 533, 534: "The ⁴⁴³ reasonableness of contracts in restraint of trade as between the parties is the sole test in those cases only where the public interests are not also involved. Although the contract may be fair and reasonable between the parties, yet if it is so injurious to the public interest that public policy requires that it should not be enforced, it will be held void." In the case of *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658, 33 L. ed. 67, the court said: "Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable."

The contract alleged in the counterclaim was unreasonable because its tendency was to stifle competition between common carriers and to create a monopoly in favor of the defendant.

The third exception cannot be sustained for the reason that, even waiving the objection that it fails to state in what particulars the testimony was incompetent and conceding that it was irrelevant, it was not prejudicial to the appellant, as will hereinafter appear.

The fourth exception must be overruled, as the grounds of objection were not stated when the testimony was offered.

We will next consider the fifth exception. The presiding judge ruled that the testimony was competent in mitigation of damages, but not as a justification for the defendant's refusal to put in the telephone. In this there was no error.

The sixth exception cannot be sustained, for the reason that there was testimony showing that the plaintiff had sustained actual damages. Under section 186a of the Code, the whole case was, therefore, properly submitted to the jury.

The seventh exception has already been disposed of.

The eighth exception must be sustained on both the ⁴⁴ grounds assigned as error. It was a charge on the facts, because they were susceptible of more than one inference.

The charge stated the law erroneously, in that it eliminated the important fact of knowledge on the part of the telephone company of the plaintiff's rights. In the latest edition of Sutherland on Damages, volume 2, page 1093, section 393, in discussing exemplary damages, it is said: "If a wrong is done willfully—that is, if a tort is committed deliberately, recklessly or by willful negligence, with a present consciousness of invading another's rights or of exposing him to injury—an undoubted case is presented for exemplary damages. . . . These damages are allowable only when there is misconduct and malice, or what is equivalent thereto. A tort committed by mistake in the assertion of a supposed right, or without any actual wrong intention and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of damages for punishment, where the doctrine of such damage prevails": See, also, *Kibler v. Southern Ry. Co.*, 62 S. C. 270, 40 S. E. 556, and *Fort v. Southern Ry. Co.*, 64 S. C. 423, 42 S. E. 196.

The questions presented by the ninth exception have already been determined.

All the questions raised by the tenth exception have been considered except the question whether there was any testimony showing actual or punitive damages. While there is testimony showing actual damages, we have failed to discover in the record any testimony from which it could be reasonably inferred that there was a willful or wanton disregard of the plaintiff's rights by the defendant.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

Jones, J., concurs in the result.

A Telephone Company cannot, as a condition precedent to furnishing an applicant with telephone facilities, require him to stipulate that he will use the system of that company exclusively: *State v. Citizens' Tel. Co.*, 61 S. C. 83, 85 Am. St. Rep. 870. As to whether mandamus will lie to compel a telephone company to furnish telephone facilities, see *Goodwin v. Telephone Co.*, 136 N. C. 258, 103 Am. St. Rep. 941, and cases cited in the cross-reference note thereto. And as to the measure of damages for wrongfully discontinuing a telephone service, see *Cumberland Tel. etc. Co. v. Hendon*, 114 Ky. 501, 102 Am. St. Rep. 290.

WILLIS v. WESTERN UNION TELEGRAPH COMPANY.

[69 S. C. 531, 48 S. E. 538.]

TELEGRAPH COMPANIES—Negligent Delay—Damages for Mental Suffering.—A telegram inquiring as to the condition of a member of one's family indicates sickness and anxiety on account of it and delay in its transmission or delivery may cause mental suffering for which damages may be recovered. (p. 829.)

TELEGRAPH COMPANIES—Negligent Delay—Question for Jury—Mental Suffering.—Whether the addressee of a telegram would have replied to it, and whether the negligence of a telegraph company in failing to deliver it was the proximate cause of the sender's mental suffering for which he seeks to recover, is a question for the jury to determine. (pp. 829, 830.)

TELEGRAPH COMPANIES—Negligent Delay—Damages for Mental Suffering.—The right to recover for mental suffering caused by negligent delay in delivering a telegram includes damages for anxiety and for negligence which prolongs such anxiety, as well as for other kinds of mental suffering. (p. 830.)

TELEGRAPH COMPANIES—Negligent Delay—Evidence.—The addressee of a telegram may, under proper pleadings, testify whether if it had been received he would have replied to it, and what such reply would have been. (p. 830.)

TELEGRAPH COMPANIES—Negligent Delay—Damages for Mental Suffering.—Actual damages for mental anguish suffered through negligent delay in delivering a telegram must be confined to such time as elapses between the time when the sender should have received an answer and the time when he receives reliable information on the subject inquired about, but this rule does not apply to the recovery of punitive damages. (p. 831.)

TELEGRAPH COMPANIES—Negligent Delay—Mental Anguish—Evidence.—Mental anguish suffered by the sender of a telegram, through the negligent delay or failure of the telegraph company to deliver it, cannot be shown by the statements of the sender as to his particular conclusions and apprehensions, from a failure to receive an answer to his telegram. (p. 833.)

TELEGRAPH COMPANIES—Negligent Delay—Mental Suffering—Mitigation of Damages.—If it is sought to recover damages for mental suffering caused by negligent delay or failure to deliver a telegram, the jury may consider, in mitigation of damages, the failure of the sender of the message to use other means of communication within his reach. (p. 834.)

G. H. Fearons, Evans & Finley and J. C. Jeffries, for the appellant.

W. S. Hall, Jr., and Butler & Osborne, for the appellee.

533 WOODS, J. The plaintiff in this case recovered a verdict for five hundred dollars on account of mental anguish caused by failure to deliver a telegram.

* The defendant's demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of ac-

tion was overruled by the circuit judge, and the appeal from this ruling will be first considered.

The complaint alleged, in substance, the following facts: The plaintiff, who resided in Gaffney, received a telegram from his father summoning him to Blackville, the home of his parents, on account of the extreme illness of his mother. Upon reaching Spartanburg, on his way to Blackville, plaintiff delivered to defendant for transmission a telegram in these words, directed to his father at Blackville: "Wire me at Columbia, care train No. 14, stating mother's condition." Twenty-four hours elapsed between the receipt of the message by the defendant and its delivery at Blackville. The plaintiff, on reaching Columbia, inquired at defendant's office for the answer he expected from his father, and suffered much mental anguish from his distress and suspense as to his mother's condition. Plaintiff's father would have sent telegram informing him of his mother's improvement, and his suffering would have been thus relieved if the message of inquiry had been delivered in time. The failure of the defendant to transmit and deliver the plaintiff's message is alleged to have been negligent, and in wanton and willful disregard of the rights of the plaintiff.

In the demurrer, six objections were made to the complaint: "1. There was nothing in the message itself which gave notice to the defendant of the importance of the message; 2. That the failure to deliver the said telegram promptly was not the proximate cause of plaintiff's alleged mental anguish; 3. Because, if the plaintiff suffered mental anguish, the complaint shows this to be an action for failure to relieve such mental anguish, which was set in motion from some other cause than the failure to deliver the telegram; 4. Because the complaint in reality shows this to be an action for anxiety instead of mental anguish; 5. Because the statute does not furnish a remedy to relieve mental anguish; 6. Because the entire alleged cause of action is ⁵³⁴ based upon the presumption of the father answering the telegram when he received it and the said presumption being an uncertainty."

As to the first objection, it need only be said that a telegram inquiring as to the condition of a member of one's family usually indicates sickness and anxiety on account of it.

The second, third and sixth objections cannot be sustained because, under the decision in Wallingford v. Western Union Tel. Co., 60 S. C. 201, 38 S. E. 443, it was a question of fact for the jury whether the father would have answered the delayed

telegram and relieved the mind of the plaintiff, and also whether the negligence of the defendant under such circumstances was the proximate cause of the plaintiff's suffering: See, also, *Western Union Tel. Co. v. Mitchell*, 91 Tex. 454, 66 Am. St. Rep. 906, 44 S. W. 274, 40 L. R. A. 211.

Our statute makes telegraph companies liable "for mental anguish or suffering . . . for negligence in receiving, transmitting or delivering messages": Civ. Code 1902, sec. 2223. The language of the statute is too broad for the refinements suggested by the fourth and fifth objections to the complaint between anxiety and other kinds of mental suffering, or between negligence which originates suffering and that which prolongs it. This disposes of the six grounds of appeal from the order overruling the demurrer, and also of the appeal from the refusal to grant a nonsuit.

The nine exceptions, relating to the admission of testimony and the charge of the presiding judge, really raise four questions, which we now consider.

J. A. Willis, the plaintiff's father, testified, if he had received his son's message he would have telegraphed informing him of his mother's improvement. The complaint alleged an answer of this kind would have been sent, and as indicated above, in considering the demurrer, it was competent, under the case of *Wallingford v. Western Union Tel. Co.*, 60 S. C. 201, 38 S. E. 443, to prove this by the person from whom the answer was expected.

The eighth exception alleges error in the refusal to charge: "If you find that the plaintiff is entitled to damages, you will be restricted and limited in making up your verdict to such damages as he would be entitled to for mental anguish and suffering from the time of the arrival of the train No. 14 at Columbia, South Carolina, until his arrival at home at Blackville, South Carolina; and if you consider him entitled to damages, such damages must be restricted wholly to the mental anguish or suffering between those times, and not for any suffering or mental anguish that he may have had by the previous receipt of the telegram from his father informing him of his mother's dangerous condition." This request was charged as to actual damages. As to punitive damages under the allegation of wantonness and willfulness, we fear, if the agents of defendant at Spartanburg, or on the line, had willfully or wantonly failed or refused to send the message to Blackville before the plaintiff

reached Columbia, the punitive damages would have reference to that willful or wanton act and to the time of its occurrence, without respect to the time of plaintiff's arrival in Columbia. The circuit judge was, therefore, right in refusing to apply the request as made to punitive damages.

The next inquiry is, Could the plaintiff, in testifying, state his own peculiar apprehensions and conclusions as to the condition of his mother when he failed to receive a telegram from his father in answer to his inquiry? This is a new question, upon which there is little authority. Such evidence has been held competent in Texas, but without much discussion by the court, and the reasoning is not convincing: *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, 12 S. W. 857, 6 L. R. A. 844; *Missouri etc. Ry. Co. v. Miller*, 25 Tex. Civ. App. 460, 61 S. W. 978.

In *Jones v. Fuller*, 19 S. C. 66, 45 Am. Rep. 761, it was held competent, in a suit for breach of promise of marriage, for witnesses having peculiar knowledge of the social position, temperament, disposition⁵³⁶ and surroundings of the plaintiff to state to the jury their estimate of the damages. This evidence was held competent from the necessity of the case. The court says: "It is difficult to conceive how it would have been possible for these witnesses to state all the various facts, or reproduce in language the condition of things, upon which they based their estimate, so as to make the same palpable to the minds of the jury. How could they express in language the degree of sensibility of the lady, or the numerous other impalpable things which went to make up their estimate of the amount of damages which she had sustained? We think it was just one of those cases where, in the language of that eminent author, Wharton, the 'facts can be best expressed by the damage they cause.'" This reasoning does not cover the case now under consideration. In breach of promise actions the individual temperament and disposition of the plaintiff enters into the estimate of damages, because the defendant may well be presumed to have acquaintance with the peculiar sensibility of his fiancée. He is hence charged with knowledge of peculiar suffering. A telegraph company ordinarily has no such knowledge, and is chargeable only with knowledge of the sensibility of people in general in the country in which its business is conducted. The conclusion as to suffering and damages is, therefore, one which the jury can draw; and, as is said in the opinion of *Jones v. Fuller*, 19 S. C. 66, 45 Am. Rep. 761, in that event the jury must be left

to draw the conclusion. In addition, it may be remarked that while the authority of *Jones v. Fuller* is fully recognized in suits for breach of promise, it will hardly be contended it should be extended to other actions except upon the clearest necessity.

Our statute allowing recovery in telegraph cases for mental suffering provides no rule of evidence for its ascertainment. In the consideration it should be borne in mind that this statute provides for the recovery of damages to which no legal standard of measurement can be applied more definite than the common sense of the jury, regulated by the discretion of the circuit judge to grant new trials, when it seems to him ~~the~~ common sense was not applied by the jury. If wisely administered by the courts, the law will tend to quicken the sense of responsibility of those charged with transmitting intelligence by telegraph, and to give relief to real victims of negligence. On the other hand, if not so administered, it is easy to see how the statute may be perverted to purposes of speculation and injustice. It is impossible to draw legal lines and diagrams including all that should be regarded "mental anguish and suffering," and excluding all that should not come within the meaning of the statute. It is safe, however, to say the statute does not mean that one morbidly nervous or abnormally gloomy should have a recovery estimated on his statement that he suffered great anguish on account of the failure to deliver a telegram, which would have brought the average man no suffering, and but trifling annoyance. Certainly this would be so in the absence of proof that the telegraph company knew of the idiosyncrasy of the person making the claim. The company is charged with the suffering which the failure to deliver the telegram may reasonably be expected to produce when its contents are considered—not the suffering due to peculiar temperament, but that of the ordinary human being. It is not intended by the statute that the hopeful should have small verdicts and the dependent large ones.

The safe and just rule is to exclude the evidence of claimant's peculiar fears, apprehensions and conclusions, and leave it to the jury, after hearing all the facts, to say, as men of common sense, with knowledge and experience of ordinary human sensibility, what mental anguish or suffering, if any, resulted under all the circumstances, and the amount that should be allowed for it.

As for slander furnish a close analogy. "The plaintiff is entitled to recover as general damages for the injury to

his feelings which the libel or slander of the defendant has caused, and the mental suffering or anguish which he has endured as a consequence thereof": 18 Am. & Eng. Ency. of Law, 1083. Yet in such actions it is not for the witnesses or he ⁵³⁸ plaintiff to say what was the meaning and effect of the words used, but such meaning must be left to the jury, under all the circumstances: 18 Am. & Eng. Ency. of Law, 1078. As said by Chief Justice Shaw, in *Snell v. Snow* 13 Met. (Mass.), 378, 46 Am. Dec. 730, to hold otherwise, "would be to make the defendant's liability depend, not on his own malicious intent and purpose in using the language, which might be quite innocent and free from blame, but upon the misconception or morbid imagination of the person in whose hearing they were spoken."

In discussing the same principle in a suit for a wrongful attachment, Justice Stone says, in *City Nat. Bank v. Jeffries*, 73 Ala. 192: "In the present case, the plaintiff was permitted to testify, against the objection and exception of defendants, that by the issue and levy of the attachment he 'was much distressed and harrassed in body and mind'; that he 'was almost crazy.' He was also permitted to prove by other witnesses the apparent distress he suffered in consequence of the attachments. Such testimony as this can be legal only on the theory that for wrongs, identical in nature and degree, the man of delicate organism and acute sensibilities is entitled to greater damages than one of a more stoical nature. We cannot agree to this. That one who has been wrongfully and vexatiously attacked may recover for his wounded feelings cannot be denied. But such suffering is not the subject of direct proof. It is an inference to be drawn by the jury from the manner and causelessness of the wrong. The nervous organization of the sufferer cannot enter into the account. Furthermore, such test might operate very unjustly. The loss of available means, and of commercial credit, might greatly distress one, while wounded pride, or impaired social standing, would equally oppress another. The court erred in admitting this proof: *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Sledge v. Scott*, 56 Ala. 202."

The plaintiff's statement of his particular conclusions and apprehensions from failure to receive the telegram should have been excluded.

⁵³⁹ The defendant, by his tenth exception, asks to have the judgment of the circuit court reversed, "because his honor erred in failing to charge defendant's verbal request to charge that the

jury might consider in mitigation of damages the plaintiff's failure to use other means within his reach." The respondent insists this exception cannot be considered, because the request was verbal, and, therefore, did not comply with rule 11 of the circuit court. It is said in *Herskovitz v. Baird*, 59 S. C. 307, 37 S. E. 922: "As the rule was intended mainly for the benefit of the circuit judge, there is no reason why he should not dispense with that provision requiring requests to be read to the court." Here the circuit judge did not see fit to enforce the rule, and the exception must be considered. It is due to the presiding judge to say he held the request to be a sound legal proposition, but did not then give it to the jury because he considered he had already practically so charged. In this the circuit judge fell into an error by inadvertence. The general statement that the jury should take into consideration all the facts and circumstances in estimating damages cannot be regarded as covering this specific request, and there is nothing in the charge on the subject more specific than the general instruction.

There was evidence tending to prove that the plaintiff had time and opportunity at Columbia and Branchville to inquire as to his mother's condition both by telegraph and telephone, but made no effort to do so. In view of this evidence, the defendant was entitled to the instruction requested, that the jury might consider in mitigation of damages the failure of plaintiff to use other means of communication within his reach. There seems to be a general concurrence of judicial opinion on the subject: 27 Am. & Eng. Ency. of Law, 1033.

The record does not show that any motion was made for a new trial, and, therefore, exceptions as to its refusal cannot be considered.

The third and tenth exceptions must be sustained, and a new trial ordered. All the other exceptions are overruled.

540 The judgment of this court is, that the judgment of the circuit court be reversed and the case remanded for a new trial.

Telegraph Companies are liable in damages, according to the better rule, for mental suffering due to their negligence in the transmission or delivery of messages, irrespective of whether such suffering is accompanied by physical pain or injury: See *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, 103 Am. St. Rep. 776; *Green v. Telegraph Co.*, 3 N. C. 489, 103 Am. St. Rep. 955, and cases cited in the cross-reference note thereto.

CASES

IN THE

SUPREME COURT

OF

TEXAS.

SCOTT v. FARMERS' AND MERCHANTS' NATIONAL BANK.

[97 Tex. 31, 75 S. W. 7.]

CORPORATIONS.—A Director of a Corporation cannot Act or It in a matter in which he has an adverse interest. (p. 840.)

CORPORATIONS—Directors—Pledge of Bonds and Their Interest.—A pledge of the bonds of a corporation for the purpose of securing its directors against liability for an indorsement made by them for it cannot be made where the directors voting to authorize the pledge are all interested in it, and a sale under the power given in the mortgage to secure such bonds is void. (p. 840.)

FRAUDULENT TRANSFERS.—A Conveyance made to Deceit the Grantor's Creditors is void as against them. (p. 840.)

CORPORATIONS, Insolvent—Conveyance in Interest of Directors of.—A conveyance made by an insolvent corporation for the benefit, in whole or in part, of its directors is fraudulent as against its creditors. (p. 840.)

RECEIVER'S SALE, Effect of upon One not a Party to the Suit.—Where the property of a litigant is placed in the hands of a receiver and sold by him, the purchaser at such sale, as against persons not parties to the suit, gets no better title than was held by the person for whom the receiver was appointed, and one holding a judgment against such party may subsequently proceed under it against the property so sold as that of his judgment debtor. (pp. 840, 841.)

RECEIVERS' AND COMMISSIONERS' SALE, Effect of as Against Parties to the Suit.—A decree for the sale of property in the hands of a receiver, followed by a sale thereunder, passes the title and claims of all the parties to the suit which are not excepted or reserved by the terms of the decree. Therefore, if one of them is a judgment debtor, he cannot subsequently, by a sale under his judgment, obtain any title to the property. (p. 841.)

CORPORATION—Officer and Promoter, When cannot Take Property Earned by.—When property is conveyed to the president of a corporation in consideration that it will build and operate

railway, he must be deemed to hold the property in trust for the corporation, unless it appears by some contract between him and it that he had authority to take title to the property for himself. This remains true, though the president claims the property as promoter and for services rendered the corporation. (p. 848.)

CORPORATION, Promoter's Right to Property of.—If one acting as a promoter and subsequently as president of a street railway corporation renders services to and advances money for it, this may entitle him to compensation, but cannot authorize him to take and hold property given as a bonus for the construction of its road, unless he is authorized to do so by the corporation itself. (pp. 849, 850.)

SALE Under Trust Deed to Clear Title and Without Payment of Any Money.—When a sale of real property is made by a trustee acting under a trust deed to secure the payment of indebtedness, where the object of the sale is merely to clear the title, the creditor not being an active party in the transaction, and no money being paid as the result of the sale, no title vests in the purchaser. (p. 850.)

ESTOPPEL to Deny Substitution of Corporation to Rights of Promoter.—If a person having a contract whereby he is to acquire title to property as a bonus for completing and operating a railroad, permits and procures a corporation to be organized to build and operate such road, he is estopped to deny that it is properly substituted in his place under such contract. (p. 850.)

APPELLATE PRACTICE—Findings of Jury, When may be Disregarded.—Where the undisputed facts are sufficient to enable the supreme court to properly dispose of a case, it may disregard the finding of the jury in response to special issues submitted to them. (p. 851.)

CORPORATION, Questioning Power of to Acquire Real Property.—Only the state can take advantage of the want of power of a corporation to take and hold real estate. (p. 853.)

CORPORATION, President of, When may not Hold Property Because He Paid Consideration for.—Where the president of a corporation could not, as against it, claim title to property under a trustee's sale, it is immaterial that he conveyed property in satisfaction of his bid at such sale. This can only give him a claim on the corporation for the amount of his bid or for the value of the property so conveyed. (p. 854.)

STREET RAILWAYS—Constitutional Provision as to Parallel Lines.—The rule of the constitution prohibiting a railway from acquiring title to a parallel and competing line does not apply to street railways. (p. 854.)

VENDOR'S LIEN, When Does not Exist.—Where one street railway corporation conveys to another, and the latter, as part of the consideration for the conveyance, agrees to build the road and operate its cars to a designated locality for a term of years, such stipulation being inserted for the benefit of the directors so conveying, no lien exists against the property so conveyed for the performance of such agreement. (p. 856.)

Clark & Bollinger, for H. C. Scott and Citizens' Railway
any.

W. Davis, for Farmers' and Merchants' National Bank

Eugene Williams and L. W. Campbell, for J. E. Parker and others.

43 GAINES, C. J. This case as tried was the result of the consolidation of two suits.

The first was brought by the Farmers' and Merchants' National Bank of Waco against H. C. Scott and the Citizens' Railway Company, a corporation operating street railways in the city of Waco, for the recovery of certain property in and near said city known as the Dummy Street Railway. The defendants in that suit filed a general demurrer, a general denial, a plea of not guilty and also specially pleaded, asserting title to the property and setting forth the nature of the claim.

The second suit was brought by J. E. Parker and others against the 44 Farmers' and Merchants' National Bank for the recovery of the same property, or in the alternative to enforce a lien upon it. Upon motion of the plaintiffs in this case, the two suits were consolidated. The petitions and answers of the several parties fully set out the facts as subsequently developed by the evidence and we deem it unnecessary to set them forth in detail here. The case was submitted to the jury upon special issues requested by the respective parties, and a verdict was returned in response thereto. Thereupon a judgment was rendered in favor of the Farmers' and Merchants' Bank for the recovery of the property in controversy and for the recovery of certain sums of money against the Citizens' Railway Company for rent, damages, etc. Parker and his associates were also decreed to have a lien upon the property for a sum of money found by the jury to be due them.

All parties having appealed, the judgment was affirmed by the court of civil appeals. Each of the parties has applied for a writ of error to this court, and all the applications have been granted. For the sake of brevity in discussing the questions in the case the Waco Dummy Street Railway Company will be designated as the "Dummy company," the Waco Electric Railway and Light Company as the "Electric company," and Parker and his coplaintiffs as "Parker and his associates."

The undisputed facts as shown by the evidence introduced upon the trial are as follows: The property is a suburban street railway and was constructed by the Dummy company, a corporation chartered under the general laws of the state. The company began to operate the railway in February, 1891, but in a few months it suspended the operation of the line, became insolvent and ceased to be "a going concern." On April

execution. On the second day of June, 1896, W. M. Sleeper, substitute trustee under the mortgage of April 15, 1891, sold the property and at the sale Parker and his associates became the purchasers. Other facts as shown by the undisputed evidence, or as established by the findings of the jury, will be stated in connection with the discussion of the questions in the case.

Parker and his associates claim title as purchasers at the sale by the substitute trustee under the mortgage of April 15, 1891, to secure the \$50,000 of bonds. They also claim, in the alternative, damages for the failure of the Electric company to construct and maintain its line of electric railway to Alta Vista, as it agreed to do in the contract of sale by the Dummy company to it; and also claim a vendor's lien upon the property to secure such damages. The Farmers' and Merchants' Bank claims title by virtue of its purchase at the sheriff's sale under the Graves judgment and also by virtue of Hobson's purchase at the sale by Rogers, trustee, and its subsequent purchase of Hobson's title at the sheriff's sale by virtue of its judgment and execution against him. The Citizens' Railway Company asserts title by virtue of the conveyance by the Dummy company of its property to the Electric company and of the purchase by Scott of the property of the latter at the sale by the special master and of the conveyance by Scott to it.

If the bonds which were intended to be secured by the mortgage of April 15, 1891, had been disposed of so as to make them an existing obligation against the Dummy company, then the mortgage to secure them would have constituted a first lien on the property, and the sale by ⁴⁶ virtue of the power given in that mortgage would have passed the title free of all other claims—save possibly that of the Graves judgment. Logically, therefore, the validity of that sale is the first question to be determined.

The bonds intended to be secured by this mortgage were never sold. As we have seen, by a resolution of the board of directors of the corporation, they were ordered to be held by the secretary to secure the directors against certain obligations incurred by them on behalf of the corporation. Each of the directors had indorsed the paper of the company for the different amounts, and these indorsements were antecedent to the attempted pledge of the bonds. In response to an issue submitted at the request of the Farmers' and Merchants' Bank the jury found that these bonds were not pledged with the concur-

rence of all the stockholders of the Dummy company. A director of a corporation cannot act for it in a matter in which he has an adverse interest: *Tennison v. Patton*, 4 Tex. Ct. 463, 67 S. W. 92, 95 Tex. 284, 64 S. W. 810. All the directors being interested in the pledge of the bonds, there was no authority to act for the company, and the resolution that was passed, having been concurred in by all the stockholders, in our opinion the attempted pledge was void, and the sale under the power given in the mortgage was therefore of no effect.

This brings us next in order to the question of the title to the Farmers' and Merchants' Bank. We will first discuss the title claimed by virtue of its purchase under the execution against the property of the Dummy company issued upon the Graves judgment. At the time of the sale under execution the property had been conveyed by the Dummy company to the Electric company; but the bank alleged in its pleading, in effect, that that conveyance was made with the intent to defraud the creditors of the Dummy company. If so, the conveyance was void as to the bank as the assignee of Graves, for the liability for which the judgment was rendered existed at the time the conveyance was made. The undisputed evidence showed that the directors of the Dummy company, or at least some of them, owned lands near a locality known as Alta Vista, the terminus of the Dummy company, and that a part of the consideration of the sale of the Dummy company to the Electric company was the promise on part of the purchaser to operate a street railway to that point for the term of five years. The jury found that this stipulation was made for the benefit of the directors of the Dummy company; and they also found, that, at the time, that corporation was insolvent. Clearly, a conveyance made by an insolvent corporation for the benefit in whole or in part of its directors is fraudulent as against its creditors. It follows that the sale made by virtue of the execution upon the Graves judgment passed the title, subject to existing encumbrances, unless the sale by the special master to Scott passed the title to the property free of the claim against it of the Farmers' and Merchants' Bank, as the assignee of the Graves judgment.

If at the time the decree was entered which ordered the sale of the ⁴⁷ property of the Electric company the bank had not been a party to the suit in which the receiver was appointed, the authorities seem to hold that the purchaser would have been in no better position with respect to that matter than was the

Electric company: Foster v. Barnes, 81 Pa. St. 377; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548; Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347. We are of opinion that such holding is correct upon principle. It would follow, therefore, that had the bank not become a party to the proceedings, it would, after the sale and conveyance by the special master, have been at liberty to proceed against the property as that of its judgment debtor the Dummy company, and to have caused it to be sold under execution, and having purchased at that sale to have contested with the purchaser at the sale under the receivership the validity of the conveyance from the Dummy company to the Electric company. The same result would have followed had the decree, the bank being a party, ordered the property to be sold subject to its claim. But as to the decree which was actually made, the statement of facts contains the following recital only with reference to the Farmers' and Merchants' Bank: "The decree after sustaining a general demurrer to the pleadings of the Farmers' and Merchants' National Bank and striking out its answer and cross-bill, without prejudice to the rights of said Farmers' and Merchants' National Bank as to its claim of lien upon the property and franchises of the Waco Dummy Street Railway therein described as the property of W. J. Hobson, the suit was dismissed as to the defendants W. J. Hobson and A. Schuster, and the court proceeded," etc. The decree was of the date of April 5, 1895. The sale was made by a special master as commissioner of the court, was reported and duly confirmed—all during the same year. The Farmers' and Merchants' Bank dismissed its intervention in October, 1897, and on December 20th, next thereafter, the final decree in the case was rendered. It was formally admitted upon the trial that the final decree did not affect the rights of the bank. What the bank's plea of intervention contained, the evidence does not show. Its claim as assignee of the Graves judgment is not mentioned in the decree; but we think it is to be presumed that it set up all its equities on that suit. At all events, we think that when property in the hands of a receiver has been sold by a decree of the court, which directs a sale without reservation as to the rights, legal or equitable, of any party to the suit, the sale pursuant to such order passes the title free of all claims of any party thereto. So, if, as in this case, the sale is ordered without prejudice as to a particular claim of one of the parties, the sale frees the title of all other claims by the same or any other party to the

proceeding. In other words, the sale of property in the hands of a receiver in pursuance of a decree for such sale passes the title and claims of all parties to the suit which are not excepted or reserved by the terms of the decree. We conclude, therefore, that the Farmers' and Merchants' Bank took no title by virtue of its purchase at the sale by the sheriff under the Graves judgment.

⁴⁸ The question then arises as to the claim of title of the Farmers' and Merchants' Bank through its purchase under its judgment and execution against Hobson. In order to dispose of this question, it becomes necessary that we shall give in some detail the facts in relation to that matter. Hobson was the promoter and principal stockholder of the Electric company. That company was incorporated under the general laws of the state about February 26, 1891. On April 6, 1891, a contract was entered into between one Childress, as trustee, on behalf of himself and others, in which the Electric company obligated itself to construct a line of street railway along certain streets of the city of Waco to the Waco Female College, through the lands of Childress and his associates, and to operate the same for the period of five years; and in consideration thereof, Childress, in behalf of himself and associates, bound himself and them to convey to the company four blocks of lots in the University Heights addition to the city. The company at the same time gave two bonds to Childress as trustee, one with and one without sureties, to secure the performance of the contract on its part. On June 4, 1892, Childress and others filed a charter for the organization of the University Land Investment Company, and on the fourteenth day of the same month he conveyed the four blocks previously mentioned, in connection with a large body of other lands, to that corporation. August 1, 1892, the University Land Investment Company conveyed the four blocks of land to Hobson. The deed recited that it was made "in accordance with the contract of April 6, 1891, between A. M. Childress, as trustee, for himself and associates of the first part, and the Waco Electric Railway and Light Company, of the second part." This shows the derivation of Hobson's title to the four blocks, which, as we shall hereafter see, was the sole consideration which passed from him in satisfaction of his bid for the property of the Dummy company at sale by Rogers as trustee.

The following are the facts which led up to the sale last mentioned.

On March 8, 1891, Hobson in his own name entered

to a contract with the Dummy company by which the company agreed to sell him its property, except the rolling stock, and in consideration thereof he agreed to convey to the company the four blocks of land in the University Heights addition hereinbefore mentioned, for the acquisition of which the electric company then had a contract with Childress and his associates. The contract was assented to in writing by all the stockholders of the Dummy company and contained other stipulations not necessary to mention in this connection. On April 1892, the directors of the Dummy company met and adopted a resolution authorizing a conveyance of its property to the electric company. On the same day its stockholders met and passed a similar resolution; and immediately thereupon, J. E. Parker, as president of the Dummy company, executed to the electric company a deed conveying the property in accordance with the resolution. A copy of the deed is not set out in the statement of facts, but it does appear that the deed was made in accordance with ⁴⁹ a resolution approved by J. W. Johnson, one of the directors, and unanimously adopted by them. This resolution provided that the deed should obligate the Dummy company to free the property from all encumbrances and should "recite a cash consideration of \$7,500 and the obligation of said Electric company and of said Hobson to operate said roads five years from date of equipment by making four round trips each day each way." The testimony shows that it was agreed by some of the officers of the Dummy company that in order to free the property of all encumbrances, it was best to have a sale made under the mortgage to the Citizens' Bank, in which Rogers was named as trustee; and one or more of the officers of the Dummy company procured the property to be advertised for sale, under the power contained in that mortgage. In reference to that matter John Sleeper testified: "I was a stockholder, director and secretary of the Dummy Street Railway Company. The trustee's sale by Robert H. Rogers, trustee of the property of the Dummy Street Railway Company, including its line of railway, in June, 1892, was made for the Waco Electric Railway and Light Company, and the purpose of such sale was to clear the title, under the original deed of trust. I know this by acting in that matter, and I did it in part. Myself and Mr. Parker, the president, did it. Mr. Hobson had nothing whatever to do with it until he went over with me and bought it. He, Hobson, bought it for the benefit of the Waco Electric Railway and Light Company under an

ment between us all. It occurred in this way: On the day Rogers as trustee was to make the sale I went and got Mr. Hobson and brought him here to the courthouse, and stood there as it was sold by Mr. Rogers, and Mr. Hobson bought it in. When I went to Mr. Hobson I went for the purpose of getting him to carry out the original contract. I just said, 'Mr. Hobson, the railroad is going to be sold to-day, and you just go over and buy it in for the Waco Electric Railway and Light Company.' He said, 'All right,' and just walked over there with me and the deed was made out by Rogers to Mr. Hobson, and Mr. Parker paid Mr. Rogers \$25 for executing the deed."

Hobson's testimony as given upon a former trial was read in evidence and was as follows: "I was president and a director of the Waco Electric Railway and Light Company on the seventh day of June, 1892, and had been such president and director ever since its organization. It was incorporated on the 26th of February, 1891, and we organized shortly after that, but I don't know the day. I don't think it was more than a month or two afterward. It was certainly in the early part of 1891. I don't think I paid any money at the trustee's sale made by Robert H. Rogers on June 7, 1892. I paid some property, four blocks in University Heights addition. They belonged to me. How they came to be mine was that they were deeded to me by Mr. Childress, or the University Heights Company, rather, as a bonus for extending the street railway through ^{so} their land. I made a contract with them. I made it in the name of the Waco Electric Railway and Light Company. [Here the contract in evidence was shown him and he identified it as a duplicate.] The signature to that contract, W. J. Hobson, president of the Waco Electric Railway and Light Company, and the signature of Sam Hobson as secretary are genuine signatures and the seal of the company is duly impressed thereon. Why I claimed these lots was because I earned them as promoter. This contract, however, was made after the company was incorporated. The contract shows that as president of the Waco Electric Railway and Light Company, and with the consent of the directors, I made this contract to run the electric road out there to that property and over that property, in consideration of a donation to the company of these four blocks. Yes, that is true. It would seem that those four blocks [were] donated to the company, but that actually, as I understood it at the time and since, [they] belonged to me. The consideration I paid for the four blocks was time and money. Yes, I was president

the company and a director, but I was not getting any salary. I did not get any pay for my time. I was also the main stockholder—owned most of the stock. I do not think anybody else owned any at that time, except there [were] some shares held by parties here. Bart Moore was a director, and so was Mr. John Sleeper, and so was Judge Williams. It is a fact that the Waco Electric Railway and Light Company did for constructing that road out there to the University Heights addition; that is, I paid for it and charged it up to the company. It was built mostly with my money—mainly up to that time. I built it in the name of the Waco Electric Railway and Light Company." Asked if he had not used the funds of the Waco Electric Railway and Light Company in complying with the Childress contract, he said: "Well, I don't know whether they had any funds. I could not tell without looking the thing up. At that time, I think not. I think I applied individually about all the funds up to the time they commenced running the cars out there. I loaned this fund to the company and the company built the track out there in accordance with the contract." Here the witness was shown a deed from J. E. Parker, president of the Waco Dummy Street Railway Company, to the Waco Electric Railway and Light Company, conveying the Waco Dummy Street Railway, already in evidence, of date of April 4, 1892, and he was asked if these blocks belonged to him individually why he took that deed to the Waco Electric Railway and Light Company instead of to himself, to which he answered: "Well, I expected it to become a part of the system at that time. I don't know whether I ever saw this deed or not. I could not tell. I don't know that I had it on record. I don't think I did. I don't know whether it was put upon record by anybody or not. If it is so certified, it must have been. I am speaking now of my own knowledge. I don't remember, I know there was such a deed. I heard about it, but I don't think I ever saw it. I don't remember whether I ever did or not. When I bought the property at Rogers' trustee sale, ⁵¹ in June, 1892, I never paid any cash. The consideration that I paid for that purchase was these four blocks of ground out at University Heights, blocks 1, 39, 49 and 57."

As bearing upon the title to the four blocks which were conveyed by Hobson to Parker and his associates, and which were the sole consideration paid for the property at the trustee's sale, the contract between Hobson and one Moore was offered in evi-

dence, which was made in the early part of the year 1891. The contract was as follows:

"It is agreed between the parties hereto that they will subscribe the amounts respectively, W. J. Hobson \$150,000 and Bart Moore \$50,000, of stock of the Waco Electric Railway and Light Company, under the conditions and agreements as follows:

"W. J. Hobson is to furnish the first money to start the building of said railroad and light plant and is to furnish all the capital needed to complete the plant as follows: An incandescent light plant of at least 2,000 lights, and enough of the track and cars and power to run the cars to fill all the contract made by the said railway company with parties who have made donations to secure the building of said road. The money and real estate received from donations and the proceeds of sales of real estate donations are to be used in construction of the road, and the balance is to be made up as aforesaid by said Hobson with the following exceptions, that is, Bart Moore is to furnish the sum or sums altogether of ten thousand dollars (\$10,000) as needed for the prosecution and completion of the work for which said Moore is to receive said (\$50,000) fifty thousand dollars of stock which he is to subscribe fully paid.

"It is further understood and agreed between said Hobson and Moore that Hobson is to manage the building of the road and light plant, without charge for his time, and Moore is to assist in the same until such time as the plant may be completed and in operation.

"The donations for building said electric railway are to be decided to W. J. Hobson and Bart Moore personally, as they may agree, or part to each as their interests may appear, to be sold at market prices for the use of the railway company as herein provided."

But the following testimony of Hobson given on a previous trial was then read:

"This paper handed me, which purports to be an agreement between W. J. Hobson and Bart Moore, is in the handwriting of my son Sam, that is, S. A. Hobson. I made that agreement as stated in that contract. That is the contract, but it is not all there. There is an addendum to this contract that is not there, that is, an addendum made afterward. This contract was made in 1891, about the time we commenced building the road. There were several things done after that that qualified the contract very materially.

"The addendum that I spoke of was rescinding that contract and releasing Mr. Moore from it. At that time I had already made contracts for the bonuses, and as I understand it, I contracted with Mr. ⁵² Moore with reference to the bonuses as my property. Mr. Moore didn't comply with this contract, that is, not fully. He had partially, and I released him from it and paid him up. Mr. Moore paid the first part of that money, and he got a note of the company for it. He gave me a note for \$2,500. He was to pay \$10,000. He paid a little over a fourth of it. I made a contract for these bonuses for myself as I understood it. What I mean is, that, whilst I owned the bonuses, I made a contract with Mr. Moore that if he would do those things I would use those bonuses, if necessary, to help build the railroad. When I would sell land I would put it in the railroad and charge it up. I put in other money at the same time. Most of the money was supplied from the outside, gotten by me, and if I sold some of the land and used the money on the road I charged the road with it.

"After I procured the charter for the Waco Electric Railway and Light Company about the 26th of February, 1891, it was hardly a couple of months after that before I organized the company. I don't remember how long; it might not have been two weeks. The stock was not placed at the time I organized the company; the road had not been built at all anywhere—nothing done toward building it, except I was there inspecting and getting ready to build the road. When I was making the contract for bonuses I made the proposition to Mr. Childress about as set forth in the contract in evidence. I proposed to sign the contract individually, like I had all the other bonuses up to that time. Mr. Childress said he would not sign in that way. I signed the railroad's name because Mr. Childress insisted it be signed that way; the deed was made to me for the land covered by said contract. I told Childress the deed was to be made to me; this was at the time the contract was signed. I told him the property was to be deeded to me; no one ever objected to me having the blocks of ground covered by the contract with Childress. It was known to the directors and stockholders generally that I was to have said blocks of ground. I had an understanding with the Dummy people that they would take these blocks as the consideration and I afterward conveyed the blocks to J. E. Parker.

"I do not think there were any shares of the Waco Electric Railway and Light Company issued to anyone until May, 1891.,

except what I had paid in after May 1, 1891. Mr. Shuster and myself owned most all the stock. I do not think at the time of the donation of these four blocks by Childress and his associates that it was understood and agreed between me and my associates that said blocks were to be used for the benefit of the company. I don't think it was understood and agreed between the directors of the Waco Electric Railway and Light Company, including Bart Moore, John Sleeper and Judge Williams, that said blocks of ground were to be used for the benefit of the company."

Bart Moore testified that the four blocks of lots were conveyed to Hobson for the benefit of the Electric company. His testimony and that quoted is about all the testimony bearing upon the question of Hobson's title to these blocks.

⁵³ The contract between Hobson and Moore shows the scheme under which the Electric company's enterprise was inaugurated, and from that contract it appears that Hobson was to furnish the money for the building of the railway and the light plant, and that he was to manage the construction without charge for his time. It also appears therefrom that the bounties the company should acquire, as inducements to the construction and operation of the railway, were to be conveyed to either Hobson or Moore for the use of the company. It was under this contract that the corporation was organized and the work begun. In the contract between Childress and the Electric company, Childress bound himself and his associates to convey to the company, or to such person as it might designate, two of the four blocks of lots, upon completion of the proposed railway from Ninth and Austin streets to the Waco Female College; and the other two, when the road was completed from the public square to the same place. The construction and operation of the railway was to be the consideration of the conveyance, and it is to be presumed it had been constructed and was in operation on August 1, 1892, when the conveyance was made to Hobson. It is evident that the consideration proceeded from the company; and we think, therefore, that, in order to show that Hobson, who was its president at the time the deed was made to him, did not take the title for the benefit of the company, it should have been made to appear that some contract had been legally made between them and the corporation where-
"v he was authorized to take full title to himself to the property.
"v corporation may contract through a duly authorized agent,
"v the authority of the agent must ordinarily be derived from

board of directors acting as a body. It may be that the whole body of the stockholders give such authority, or may at least estop themselves from denying that such authority has been given. There is no pretense whatever, in this case, that there was ever any resolution of the directors or any action whatever of the stockholders of the Electric company which gave Hobson the right to claim the bonus given to the company for the construction and operation of its road. That Hobson may have changed his contract with Moore, or that the directors knew that he was claiming the bonus as Hobson testified, can make no difference. The blocks were earned by the company under a contract in the name of the company, and became equitably the property of the company, unless properly authorized to be conveyed to Hobson for his own benefit. Under the contract with Moore, it is very clear that he could not have claimed the blocks as his own; and while in his testimony he attempts to show that that contract was changed by a subsequent agreement between himself and Moore, he nowhere says that this change was made before the blocks were conveyed to him by the University Land Investment Company. But, leaving that contract wholly out of view, we fail to see how under the facts of this case Hobson could claim the property as his own in the absence of some corporate action on the part of the company which authorized him to take a conveyance of the property for his own use. ⁵⁴ If, without salary or other compensation, he rendered services in the advancement of the enterprise, and if he furnished his own money to construct the road, this may have entitled him to compensation by the company, but it did not entitle him to take and hold the property of the corporation as his own unless authorized to do so by the corporation itself. We therefore conclude, that when the four blocks of lots were conveyed by the University Land Investment Company to Hobson he held them in trust for the Electric company.

We come next to the question as to the effect of the sale by Rogers, as trustee, at which the property of the Dummy company was bid off by Hobson. In regard to this matter the first inquiry which suggests itself to our minds is, Was this a sale which passed any title whatever? The property was mortgaged to the Citizens' National Bank to secure the payment of an indebtedness due to it by the Dummy company. It seems, though the testimony is not direct upon the point, that, at the time the property was advertised and at the time it was sold, this indebtedness had not been paid. Therefore the trustee was em-

powered to sell the property for cash to pay the indebtedness. The sale was made to clear out the title of the Electric company, as the evidence showed and as was found by the verdict of the jury. With the view to carry out the purpose of clearing out the title, a sale in form was made; the property was bid off by Hobson for the sum of \$7,500; but the money was never in fact paid. The bank, the mortgage creditor, recovered nothing. The only consideration of the deed which was executed was the conveyance of the four blocks of lots previously mentioned—not to the mortgagee, the bank, but to Parker, presumably as the representative of the Dummy company or of its directors. The contract between the Dummy company and the Electric company bound the latter to convey the blocks upon compliance by the former with the terms of the agreement, and hence that conveyance could not constitute a consideration for another contract. We note just here that it is insisted on behalf of the Farmers' and Merchants' Bank that Hobson was entitled to the lots under his original contract with the Dummy company, which was in his individual name, and as is also insisted for his own benefit. The answer to this claim is, that he could never have acquired title to the lands except by complying with the terms of that contract. This he made no pretense of doing, but permitted the Electric company, of which he was president, to take his place in the contract, and to accept the conveyance of the Dummy property. That he may not have been present when the deed was executed can make no difference. He admits that he knew of the deed and does not testify that he made any objection to the transaction or asserted at the time any claim as against the rights of the Electric company under the conveyance. The testimony admits of no conclusion other than that the whole transaction was carried out by his consent, if not by his procurement. We think he and those who claim under him should be held estopped to deny that the ^{ss} Electric company was properly substituted to his place under his original contract.

It is worthy of note, that, in the transaction which resulted in the sale by Rogers as trustee, so far as we have been able to see from the testimony, the Citizens' National Bank, the mortgagee, does not appear. It did not order the sale nor did it receive any money or any equivalent therefor upon the bid of Hobson. This is probably accounted for by the fact that the moneys due to it from the Dummy company were secured by the mortgages of its directors or some of them.

The only deduction from the testimony is that the sale was a mere scheme to clear the title, which had been conveyed by the dummy company to the Electric company, and that this was done in pursuance of that provision in the contract between the two corporations that the title to the Electric company was to be freed from encumbrances. Therefore, we fail to see how Hobson, the president of the latter company, could, by purchasing at such sale acquire title as against that company.

So far we have treated the questions just considered upon the facts which we think are shown by the undisputed evidence adduced upon the trial. The chief embarrassment in the determination of the questions grows out of the findings of the jury upon the special issues submitted to them. The court of civil appeals held, that, since the assignment to the action of the trial court in refusing to set aside the verdict was too general to be considered, the findings of the jury should be taken as established facts and binding upon the appellate courts. Ordinarily, this is the true rule; but whether such rule is inflexible and should be deemed to apply in a case like this, where the issues submitted were as to isolated facts and some of the findings appear to be directly in conflict with the evidence, we need not determine.

We will briefly consider some of these findings, as to their effect upon the true issues in the case.

1. In response to an issue submitted by the Farmers' and Merchants' Bank the jury found, in effect, that the consideration of the conveyance of the four blocks to Hobson "moved from Hobson to the maker of the deed" "in money and services." As we think, this was not a controlling issue in the case. The evidence was probably sufficient to show that he furnished the money to construct the railway of the electric company and rendered service in its construction. It does not follow that he did not advance the money and render the services for the company. As we have already said, he may have had a claim against the company for the money and services, but could not claim the lots which were the consideration of the construction of the road, which was built by and for the company, without some action on the part of the directors of the corporation which gave him that right.

2. The jury also found, in response to an issue submitted by the bank, that it was the intention of the makers of the deed to Hobson and of Hobson himself to vest title in him for his own benefit. We ⁵⁶ think it immaterial that the parties to the

deed may have intended to invest the title in Hobson for his own use. This intention exists in every case of a constructive trust.

3. It was also found by the jury that Hobson "was owner" of the blocks. He was the owner in the sense that he held the legal title. It does not follow that he held the equitable title. Besides the issue as to the ownership of the lots involved, under the evidence, questions of law and fact, and there having been no instructions as to the law applicable to the issue, it is impossible to determine what were the facts found by them. They may have been mistaken as to the law, and this mistake may have led to the finding.

4. We also think it immaterial, as found by the jury, "that it was agreed between Parker and his associates, being directors of the Dummy company, on the one hand, and Hobson on the other," that they accepted the four blocks in payment of his bid.

5. The jury also found that Childress entered into the contract to build the electric line with "Hobson as an individual." Since the contract was in writing and was made with the Electric company, it is difficult to conceive the meaning of this finding, unless it be that Hobson made the contract with the intention that it should inure to his own benefit. He testified himself that Childress refused to contract with him personally, but consented to contract, and did contract, with the company. That Hobson may have intended the contract for his own benefit can, as we think, make no difference. It was the contract of the company.

6. In answer to an issue in substance whether Hobson paid any money for the four blocks, and if so when, how much and to whom did he pay it, the jury found simply, "Yes, in completion of road, money and services paid to A. W. Childress." This finding is incomplete, and for that reason should probably not be considered; but if considered, it amounts to no more than a similar finding in response to an issue submitted at the request of the bank, the effect of which we have already discussed.

7. The following issues were submitted as one, at the request of Scott and the Citizens' Railway Company, and to them the accompanying answer was given: "Did W. J. Hobson pay out any money as a bidder at said sale? And did he give any consideration for the deed made to him by said Rogers as trustee?" Answer: "He did." In view of the fact that the undisputed testimony shows that no money was paid at the sale, ex-

cept \$25, which was paid by Parker to Rogers, trustee, for making the deed, and with money which he testified "belonged to the concern," it is incomprehensible to us that the jury should have intended to find the affirmative of the first question submitted in the issue. We therefore doubt whether it should be deemed a finding as to that matter at all. But whether deemed a finding or not, we think it unimportant. Not having found that Hobson paid \$7,500, the amount ⁵⁷ of his bid, it seems to us wholly irrelevant that he paid some money to some person.

But it is urged on behalf of the Farmers' and Merchants' Bank that, for the reason that the Electric company was without power to acquire and hold lands for any other purpose save for that of operating its railway and light plant, it acquired no right to the blocks. On the other hand, it is contended that, under our Revised Statutes, the corporation was authorized to acquire the blocks of land to aid in the advancement of its enterprise. We do not find it necessary to decide the latter question. The case principally relied upon in behalf of the bank is *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. Rep. 216, 33 L. ed. 513. The point there decided is that, when a corporation is not empowered to take and hold lands, a court of equity will not aid it to enforce a trust and thereby acquire the title to land. The position of the defendant in that case with reference to the lands there in controversy was very similar to that of Hobson with respect to the four blocks of lots, the title of which is in question in this suit. But the general rule is that only the state can take advantage of the want of power of a corporation to take and hold real estate. The supreme court of the United States so held in the case of *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. Rep. 93, 33 L. ed. 317, and the same principle was announced by that court in the case of *National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188. It was also followed by this court in the case of *Russell v. Texas etc. Ry. Co.*, 68 Tex. 646, 5 S. W. 686. In the case last cited, a railroad company was held entitled to maintain its action to remove a cloud from its title to land, although it may not have been empowered by its charter to acquire the lands. Judge Thompson says: "Another way of expressing the same doctrine is to say that whether a corporation has violated its charter or exceeded its powers in taking a conveyance of land will not be inquired into collaterally, in an action between private parties contesting the title to the land": Thompson on Corporations, sec. 5799. The ruling in *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. Rep. 216, 33 L.

The claim is that that stipulation in the contract was placed in it for the benefit of Parker and other directors of the Dummy company, who owned lands in the vicinity, which were to be enhanced in value by the construction and operation of the line. They recovered a judgment for the damages, with a decree enforcing a lien, in the nature of that of a vendor, upon the property. It is maintained that this decree is justified by the decision of this court in the case of *Howe v. Harding*, 76 Tex. 17, 18 Am. St. Rep. 17, 13 S. W. 41, but we think the two cases may be readily distinguished. In *Howe v. Harding*, a right of way had been granted by deed to a railroad company over land, the consideration of the conveyance being a promise on part of the company to construct a water tank on the land to be supplied from a spring and to pay appellee for the use of the water as much as it should pay other persons along its line for a like service. The tank was discontinued, and appellee sued for damages and for enforcement of a lien upon the right of way to secure the judgment. He was held entitled to his damages and lien. The nature of the contract appears from the following extracts from the opinion: "It was shown that in 1866 title to the entire tract of land over which the right of way was granted was in Nancy S. James, but appellee was permitted, without objection, to state that she heard the contract read, and that it was made for his benefit with her consent, the inference being that the promise was made directly to him, and that he had lived on the land and been in actual possession since 1854, claiming it; that his homestead of 200 acres was nearly 1,000 varas square, over which the road ran more than one mile circuitously, and that on this was the elevated ⁵⁹ spring and water tank. Miss James was shown to be a near relative, who had been a member of appellee's family for more than fifty years, and the inference from the evidence is that while title to a part of the land, or it may be the whole, stood in her name, that the beneficial interest was in appellee. . . . If the appellee was the owner of the land over which the railway runs, under the uncontroverted facts the company has the right to it, whether he signed the conveyance or not; but as compensation provided by the contract for water service was, in part at least, the consideration thereof, a lien on the right of way, though but an easement, exists to secure, in so far, its payment." It thus appears that in that case the promise to maintain the tank, etc., was made directly to the appellee. Now, this court has held that, in a transaction for the sale of land, a note given to a

third person by the vendee as the consideration of the sale may carry with it a lien upon the land for its payment: *Pinchus v. Calhoun*, 21 Tex. 333. If it be so with a promise to pay money, why not with a contract to do some other thing as a consideration for the conveyance? But in this case there was no promise to Parker and his associates to give a lien, or in fact to do anything, and we think none should be implied. The benefits which were expected to accrue to them were remote and collateral to the transaction. Besides, as we think, it was inconvenient for them, being directors of the company, to stipulate for their own benefit.

Another question suggests itself. The Dummy corporation being insolvent and the directors having transferred the property, in part at least, for their own benefit, can a court afford them relief by way of giving damages for a breach of the contract? *Estes v. Roundtree*, 36 Tex. 110; *Davis v. Smith*, 43 Tex. 417.

The evidence does not clearly show the time at which the Electric Company definitely abandoned the operation of its line to Anna Wilson, and therefore we forbear the discussion of the question of the statute of limitations, which was pleaded as to the claim of Parker and associates for damages.

For the reasons given we think that the judgment of the court of civil appeals and that of the district court should be reversed and the cause remanded, and it is accordingly so ordered.

That no officer of a Corporation is not qualified to act for it in a transaction wherein he has an adverse interest, see Pacific Vinegar Co. v. Smith, 125 Ill. 111, 132, ante, p. 42, and cases cited in the cross-reference note thereto. As to the validity and effect of a sale of corporate property to a director, see *Sweeney v. Grape Sugar Co.*, 3 W. Va. 443, 4 Am. St. Rep. 38; *Beach v. Miller*, 136 Ill. 162, 17 Am. St. Rep. 301; *Milburn v. Chapman*, 76 Mass. 942, 71 Am. St. Rep. 347; *New Memphis Light Company Cases*, 105 Tenn. 268, 89 Am. St. Rep. 280. And as to preferences by an insolvent corporation in favor of its officers, see *Richland Consolidated Min. Co. v. Reutter*, 24 S. Dak. 333, 122 Am. St. Rep. 726.

The position of Promoters of a Corporation to the company is discussed in the note to Pittsburgh Min. Co. v. Spencer, 17 Am. St. Rep. 121, 126, and the subsequent cases of *Busher v. Richmond etc. Land Co.*, 26 W. Va. 455, 17 Am. St. Rep. 573; *Yale etc. Stone Co. v. Wilson*, 64 Conn. 111, 42 Am. St. Rep. 156. They cannot legally take any advantage over the members of the corporation, and are accountable to it for any profits realized from a violation of their duty in respect *Pittsburg Spring Park Co. v. Roberts*, 92 Wis. 345, 33 Am. St. Rep. 917. As to their right to compensation, see *Tanney v. etc.*, R. R. Co., 166 Mo. 28, 89 Am. St. Rep. 674, and cases in the cross-reference note thereto.

MARYLAND CASUALTY COMPANY v. HUDGINS.

[97 Tex. 124, 76 S. W. 745.]

PLEADING.—Facts Alleged by One Party Need not be Pleaded by the Other. (p. 859.)

INSURANCE, ACCIDENT—Death from Potomac Poisoning. When a policy insuring against accident provides that it does not cover injuries resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, a recovery cannot be sustained for injuries and death resulting from eating unsound and spoiled oysters not known to be such when eaten. (p. 861.)

Baker, Botts, Baker & Lovett and J. S. McEachin, for the plaintiff in error.

Sheppard, Jones & Sheppard, for the defendant in error.

¹²⁶ BROWN, A. J. On October 6, 1900, the Maryland Casualty Company, a foreign corporation doing business in Texas on a permit from the state, issued and delivered to William T. Hudgins a policy of accident insurance which contained these stipulations: "The Maryland Casualty Company, Baltimore, Maryland, hereinafter called the company, does hereby insure William T. Hudgins, of Texarkana, in the county of Bowie, and state of Texas, hereinafter called the assured, by occupation a lawyer, classified by the company as a 'spl,' for the term of twelve months, beginning on the sixth day of October, 1900, at 12 o'clock noon, and ending on the sixth day of October, 1901, noon, standard time, in the amount of five hundred dollars, principal sum, and twenty-five dollars weekly indemnity, against bodily injury, sustained through external, violent and accidental means, as follows: First. If death shall result from any such injury, independent of all other causes, within ninety days from the happening of the accident causing such injury, the company will pay the principal sum above specified to Mrs. Sallie N. Hudgins, wife of the assured, if surviving, otherwise to the legal representatives of the assured. . . . This insurance does not cover . . . injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled."

Mrs. Sallie N. Hudgins, the beneficiary in the said policy, instituted suit in the district court of Bowie county, and by appropriate allegations set up the making and delivering of the policy, her right to maintain the suit, and the death of William

T. Hodgins, placing the facts in connection with the said death and the causes which brought it about, as follows: "That while said policy was in full force and effect according to the face and reading thereof, as was in October 28, 1900, the said William T. Hodgins did receive a bodily injury through external violence and accidental means: from which, independently of all other causes, the said William T. Hodgins died on November 1, 1900: that the nature and character of said accident to the said William T. Hodgins and the injury arising therefrom and causing his death were as follows: That on October 28, 1900, the said William T. Hodgins ordered, among other things for his dinner, some raw oysters: that some of said oysters were unsound and spoiled: that the said William T. Hodgins ate about one one or two of said oysters, and soon thereafter discovered that they were unsound and spoiled; that at the time he ate them he did not know that they were unsound and spoiled: that had he known that said oysters were unsound and spoiled he would not have eaten them: that as soon as he learned their unsound and spoiled condition he discontinued them: that a few hours after he had eaten said unsound and spoiled oysters his stomach began to cramp and he vomited and there in his bowels and stomach: that he became sick in his stomach, vomited and passed bloody mucus and mucus in his bowels, that said unsound and spoiled oysters had caused the vomiting and inflated his bowels to such an extent that they were distended and prevented from performing the functions essential to the maintenance and sustenance of life: that he gradually and rapidly grew worse until he died on November 1, 1900, from the effects of eating said unsound and spoiled oysters accidentally, and from the effects of said unsound and spoiled oysters lodging in his intestines and bowels, and one or both of said accidents being the proximate cause of his death."

Defendant answered by a general denial, by special exceptions and a general denial, and specially pleaded as follows: That the doctor answer defendant says that said policy contains a stipulation that said policy does not cover injuries from or otherwise resulting from poison or anything and certainly not otherwise from a poisonous substance or tainted; and that if said unsound or spoiled oysters caused the death of said William T. Hodgins, it was because said spoiled oysters contained poison or the poison and that therefore defendant was liable and plaintiff ought not to recover, and of this is yet

itself upon the country." The evidence established the allegations of the petition as to the manner of Hudgins' death, but the facts need not be repeated.

Upon a trial before a jury, after the evidence was introduced, the defendant in the court below filed the following demurrer to the evidence and motion for instruction: "Now comes the defendant, by Webber & Webber and Dan T. Leary, its attorneys, and says the evidence offered herein and introduced by the plaintiff fails to show any right for plaintiff to recover herein, and defendant demurs to the evidence of plaintiff and says the same is not sufficient to entitle plaintiff to a judgment. Wherefore the defendant prays that the court instruct the jury to return a verdict in favor of the defendant." The court refused the request to instruct the jury to find for the defendant and proceeded with the trial submitting the issue to the jury, and verdict was rendered for the plaintiff for the amount of the policy with interest thereon, which judgment was by the court of civil appeals affirmed.

The court of civil appeals held that the answer specially set up that the deceased died from ptomaine poison, and under such answer the defense that the oysters were voluntarily taken into the stomach and death ensued therefrom was not admissible. The answer of the defendant set up the clause excepting from liability death or injury arising from poison or anything taken, etc., and alleged, that if the oysters taken or swallowed by the deceased caused his death, then it was because the said oysters contained "ptomaine poison." The word "because" marks the means by which death was produced and not the reason why the defendant is not liable; but the answer continues: "And therefore ¹²⁸ the defendant is not liable," etc., which refers to all of the facts set up in the answer as constituting a defense to the plaintiff's claim. Plaintiff's petition contains specific allegations of the facts attending the eating of the oysters by deceased and the manner in which it is claimed the oysters produced the death of Hudgins. The facts alleged in the petition, taken in connection with the answer of defendant, were sufficient to present the whole defense claimed by the defendant. It is a well-established rule of pleading in our court that facts alleged by one party need not be pleaded by the other: *Lyon & Gribble v. Logan*, 68 Tex. 525, 2 Am. St. Rep. 511, 5 S. W. 72; *Gaston v. Wright*, 83 Tex. 286, 18 S. W. 576.

The court erred in refusing to sustain the defense that the injury was excepted from the obligation of the contract presented under the following assignment of error: "The court erred in overruling defendant's demurrer to plaintiff's evidence and in refusing to sustain and grant defendant's motion herein to instruct the jury in this case to return a verdict in favor of the defendant." The policy sued upon contracted to indemnify William T. Hudgins against bodily injuries sustained "through external, violent and accidental means," but the policy did not propose to indemnify against the consequence of all accidents. Much argument has been indulged in by the counsel for defendant in error, as well as the learned judge who wrote the opinion of the court of civil appeals, to establish that the means by which Hudgins lost his life was accidental. In the view we take of the case it is unnecessary to discuss that question, for, granting that it comes within the terms of the policy as being "external, violent and accidental," yet it is just the character of accident which is specifically excepted from the obligation by this language: "This insurance does not cover . . . injuries fatal or otherwise resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled." The word "take" means, to eat as food, to swallow: Webster's Dictionary, word "take," 2d par. b. The true meaning of the policy will be shown by reading its different clauses which bear upon this question in connection; thus: "The Maryland Casualty Company . . . does hereby insure William T. Hudgins . . . for the term of twelve months . . . against bodily injuries sustained through external, violent and accidental means. . . . This insurance does not cover injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken. . . . But it is understood that this policy covers the assured according to the terms hereof in the event of his injury from . . . choking in swallowing." The last clause quoted was introduced to qualify the excepting clause; the words "choking in swallowing" can refer to no word in the qualified clause except "taken," and serves to define the meaning of that word.

It is true that the policy should be construed in that manner which is most favorable to the assured, and if the language of the contract is fairly susceptible of any construction that would make the insurer responsible for the loss, it would be the duty of the court to place such ¹²⁹ construction upon it; but the courts cannot undertake to make a new contract in disregard

of the plain and unambiguous language used by the parties. The plain meaning of this language is, that the company excepts from its liability all injuries which may arise from whatever thing of any kind or character poisonous or not Hudgins might voluntarily and consciously take into his stomach, that is, swallow as food or drink, and any other meaning attributed to the exception would be in disregard of the plain language and would give to the policy a force and effect never intended by the parties.

There is no doubt that the oysters, whether poisonous or not and whether taken accidentally or not, were consciously and voluntarily swallowed by Hudgins, and this being the case, it comes strictly and clearly within the terms of the excepting clause, and there can be no liability under that contract for the injury which resulted in his death: *Carnes v. Iowa Traveling Men's Assn.*, 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; *Kasten v. Interstate Casualty Co.*, 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651; *Early v. Standard Life etc. Ins. Co.*, 113 Mich. 58, 67 Am. St. Rep. 445, 71 N. W. 500; *Pollock v. United States Mut. Acc. Assn.*, 102 Pa. St. 234, 48 Am. Rep. 204; *McGlothter v. Provident Mut. Acc. Co.*, 89 Fed. 685, 32 C. C. A. 318; *Westmoreland v. Preferred Acc. Ins. Co.*, 75 Fed. 244; *Bayless v. Travelers' Ins. Co.*, 14 Blatchf. 143, 2 Fed. Cas. No. 1138; *Cole v. Accident Ins. Co., Ltd.*, 61 L. T., N. S., 227.

In *Pollock v. United States Mut. Acc. Assn.*, before cited, the supreme court of Pennsylvania said: "To remove all doubt as to the liability of the association to the plaintiff in this case, the certificate further declares the benefits under it shall not extend to any death or disability which may have been caused by the taking of poison. It is not necessary that the poison be taken with an intent to produce death, in order to defeat a claim flowing from the right of membership. If the poison be innocently taken, and without any knowledge of the injurious effect which it was likely to produce, and did produce, so far as the person taking it is concerned, the effect may be said to be accidental. If we go a step further and admit in such case that the means are accidental, yet it is one of the accidental means expressly excepted from the protective power of the certificate."

In the case of *Westmoreland v. Preferred Acc. Assn.*, before cited, there was the same exception in the policy as that under consideration. In that case the party died from inhaling

chloroform which produced death. The chloroform was properly administered by a physician, and it was claimed that, while the administering of the chloroform was intentional, the effect was accidental, and therefore within the terms of the policy. Judge Newman used this language: "How could there be a case that comes more clearly within the language of this exception, in the sense in which it must have been used? It need not necessarily, it seems to me, be malpractice or carelessness on the part of the physician or surgeon, but certainly, to come within this exception, ¹³⁰ the medical or surgical treatment must be the proximate cause of death. If this is not true of this case, it seems difficult to imagine a case to which the exception would apply. So that, considering the right to recover of the company under the general terms of the policy, or under either of the exceptions just referred to, I am clear that there is no liability." The death of Hudgins in this case was caused by swallowing unsound oysters, and whether it was "accidental or otherwise," it is strictly within the exception contained in the policy.

Many cases have been cited to show that inhaling of gas from which death followed must be voluntary, to bring it within the terms of this exception; but, granting the full force of those authorities, they do not support the claim of defendant in error, because there is no doubt from the evidence that the oysters were voluntarily taken into the stomach of Hudgins.

Miller v. Fidelity etc. Co., 97 Fed. 836, is more nearly analogous to the case now before us in its facts than any other that has been cited by appellees, but we do not regard it is sound in its doctrine as applied to the facts before that court, and it certainly does not bear upon the question now before us. The main question discussed by the court in that case was, whether the injury resulted from external, violent and accidental means, but neither of the questions are involved in the decision of this case. The case of Healey v. Mutual Acc. Assn., 133 Ill. 556, 23 Am. St. Rep. 637, 25 N. E. 52, 9 L. R. A. 371, is somewhat similar in its facts to this, but the question discussed and decided in that case was the same as in the preceding case.

It is claimed that while the eating of the oysters was not accidental, the eating of spoiled oysters was accidental, because Hudgins did not intend to eat unsound oysters—the accident consists in the state of the thing swallowed. This is a shadowy distinction, but, admitting it to be sound, it does not take the

case out of the exception, for the spoiled oysters was a thing; it was "taken" from which the injury resulted, which brings the case under the exception and takes it out of the obligation of the contract.

We are of opinion that the undisputed evidence in this case shows that the death of William T. Hudgins was caused by means embraced within the exception from liability contained in the contract of insurance, and that no cause of action was or can be shown against the plaintiff in error upon that contract. The district court erred in not instructing the jury to find a verdict for the defendant below, and the court of civil appeals erred in affirming that judgment. It is therefore ordered that the judgments of the district court and of the court of civil appeals be reversed and judgment be here entered; that Sallie N. Hudgins take nothing by her suit; that the Maryland Casualty Company go hence without day and recover of Sallie N. Hudgins all costs in all of the courts.

Whether Death by Poisoning is covered by an accident insurance policy is discussed in the note to Metropolitan etc. Assn. v. Froiland, 52 Am. St. Rep. 363, 364; and the subsequent cases of Early v. Standard Life etc. Ins. Co., 113 Mich. 58, 67 Am. St. Rep. 445; Carnes v. Iowa State etc. Assn., 106 Iowa, 281, 68 Am. St. Rep. 306; Omberg v. United States etc. Assn., 101 Ky. 303, 72 Am. St. Rep. 413.

AUSTIN AND NORTHWESTERN RAILROAD COMPANY v. CLUCK.

[197 Tex. 172, 77 S. W. 403.]

EVIDENCE—Physical Examination of the Plaintiff.—In an action to recover for personal injuries suffered by him, the plaintiff cannot be required to submit to an examination of his person by physicians appointed by the court. (p. 874.)

EVIDENCE—Physical Examination of Plaintiff, Testimony that He Refused to Submit to.—In an action to recover for personal injuries suffered by the plaintiff, he may be asked on cross-examination whether a proposition had been made to him to have the court appoint a committee of physicians to examine him for the purpose of ascertaining the nature and extent of the ailments of which he complains in the case. (p. 875.)

S. R. Fisher and Baker, Botts, Baker & Lovett, for the plaintiffs in error.

John Dowell and H. N. Swain, for the defendant in error.

¹⁷⁵ BROWN, A. J. From the opinion of the honorable court of civil appeals we copy the following statement of the facts as found by that court:

"This is a suit for damages caused by the plaintiff's falling into a well dug, operated and controlled by the Austin and Northwestern Railroad Company. There was a jury trial, resulting in a verdict and judgment for the plaintiff for two thousand dollars, and the defendants have appealed.

"The testimony shows that the Houston and Texas Central Railroad Company since the accident occurred has succeeded to all the rights and liabilities of the Austin and Northwestern Railroad Company, and if one company is liable, both are.

"The accident occurred at night, and the verdict of the jury involves a finding that the Austin and Northwestern Railroad Company was guilty of negligence in failing to keep the well properly covered, and that the plaintiff was not guilty of contributory negligence, as charged in the answer of the defendants, and that, as a direct result of the defendants' negligence, the plaintiff was injured to the extent of two thousand dollars. The record contains evidence sufficient to support all of these findings; and therefore, the objections to the verdict are overruled.

"The plaintiff charged in his petition that as a result of his falling in the well, he was permanently injured in his back, sides, kidneys, hips, hip joints, spine, bladder, stomach and bowels.

"Within proper time the defendants made a motion, stating that the plaintiff had been examined by two physicians of his own selection, who would testify in his behalf; that he had not been examined by physicians selected by the defendants, or by any other physicians, and requested ¹⁷⁶ the trial court to appoint a committee of two or more competent physicians, and compel the plaintiff to submit to an examination by the physicians so appointed, in order that the defendants might have the benefit of the testimony of such physicians.

"In support of the motion it was shown that the plaintiff had refused to consent to the appointment of such committee, and to the examination requested. The court overruled the motion, and that ruling is assigned as error."

The plaintiff in error asserts that it had the right at the trial to have the court appoint a committee of physicians to make a physical examination of the defendant in error to qualify them to testify before the jury as to the injuries received by Cluck,

and their effect. The right to have such examination is supported by the greater number of decisions of the courts of the states of this Union and by the text-writers. The following cases support the right asserted: *Richmond etc. Ry. Co. v. Childress*, 82 Ga. 719, 14 Am. St. Rep. 189, 9 S. E. 602, 3 L. R. A. 808; *Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Alabama etc. Ry. Co. v. Hill*, 90 Ala. 71, 24 Am. St. Rep. 764, 8 South. 90, 9 L. R. A. 442; *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; *Atchison etc. Ry. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Schroeder v. Chicago etc. Ry. Co.*, 47 Iowa, 375; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Missouri etc. Ry. Co. v. Baily*, 37 Ohio St. 104; *Lane v. Spokane etc. Ry. Co.*, 21 Wash. 119, 75 Am. St. Rep. 821, 57 Pac. 367, 46 L. R. A. 153; *Wanek v. City of Winona*, 78 Minn. 98, 79 Am. St. Rep. 354, 80 N. W. 851, 46 L. R. A. 448; *Graves v. City of Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561, 54 N. W. 757, 19 L. R. A. 641; *City of South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200, 60 N. E. 271, 54 L. R. A. 396; *Brown v. Chicago etc. Ry. Co.*, 12 N. Dak. 61, 102 Am. St. Rep. 564, 95 N. W. 153. The supreme court of Missouri first held that the courts had no power to compel a party to a civil case to submit to a physical examination: *Loyd v. Hannibal etc. Ry. Co.*, 53 Mo. 515. After vacillating, and qualifying their decisions in various particulars, that court, in *Shepard v. Missouri Pac. Ry. Co.*, before cited, announced the doctrine contended for by the railroad company in this case. The decisions of the supreme court of the state of Indiana cover all phases of this question from an absolute denial to the assertion of the right in a qualified sense, as announced in the case of *City of South Bend v. Turner*, above cited. That case has been since greatly qualified, and their decisions are in such conflict on the question that they are of little value as authority. The case of *Richmond etc. Ry. Co. v. Childress*, 82 Ga. 719, 14 Am. St. Rep. 189, 9 S. E. 602, 3 L. R. A. 808, rests upon the following statutory provision: "Every court has power to control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." This statute authorized the examination in the state of Georgia, hence that case is not authority upon the question of power under the common law. The authorities above stated, as well as many cases which we have not cited, fully sustain the conclusion of the supreme court of

Indiana in the case of *City of South Bend v. Turner*, which is embodied in the following propositions: "1. That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; ¹⁷⁷ 2. That a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; 3. That the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; 4. That the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed or fully elucidated by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; 5. That the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated, is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; 6. That such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding."

Counsel for the defendant in error deny the authority of the court to require the plaintiff in this case to submit to a physical examination by a committee to be appointed by the court, in which they are supported by these authorities: *Parker v. Enslow*, 102 Ill. 279, 40 Am. Rep. 588; *McQuigan v. Delaware etc. Ry. Co.*, 129 N. Y. 50, 26 Am. St. Rep. 507, 29 N. E. 235, 14 L. R. A. 466; *Stack v. New York etc. Ry. Co.*, 177 Mass. 155, 83 Am. St. Rep. 269, 58 N. E. 686, 52 L. R. A. 328; *Peoria etc. Ry. Co. v. Rice*, 144 Ill. 232, 33 N. E. 951; *Roberts v. Ogdensburgh etc. Ry. Co.*, 29 Hun, 154; *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, 35 L. ed. 734. The question has been before this court in these cases: *International etc. Ry. Co. v. Underwood*, 64 Tex. 463; *Missouri Pac. Ry. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325; *Gulf etc. Ry. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703; *Gulf etc. Ry. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583. In each case this court declined to decide the question now before us; therefore, it is practically a new one, which we must determine by the weight of authority, or upon the sounder reasoning, as derived from the provisions of our constitution, the statutes and the common law.

in citing a number of cases to support their decision in the case of *City of South Bend v. Turner*, 156 Ind. 418, 83 St. Rep. 200, 60 N. E. 271, 54 L. R. A. 396, the supreme court of Indiana said: "These cases assert the doctrine that courts are instituted by the state to administer impartial justice to contending parties. In such contests it is the duty of the court to bestow upon the litigants equal and exact justice. Justice cannot be done without the court first obtaining the exact full truth concerning the matters in controversy. Hence this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make subservient to its order all persons and things that will afford the most reliable evidence." That honorable court gives no source from which it is claimed the courts derive the power to compel a party to submit to examination, but asserts that the duty to administer justice implies "all power necessary to its performance, which includes the ¹⁷⁸ power to make subservient to its order all persons and things that will afford the most reliable evidence." If this proposition be well founded, then, indeed, the power of a court over the persons and parties who apply to it for adjustment of their rights is unlimited. This statement of judicial power is too broad to be accepted as correct; but that line of decisions cannot be sustained by less comprehensive authority. The point we wish to call attention to is, that the court does not claim to derive its authority from either the common law, the constitution of that state, or from the statutes of Indiana. Comment upon *City of South Bend v. Turner*, is equivalent to a comment upon the other cases, because it is perhaps the best reasoned of all, and fairly represents them.

Article 5, section 8, of the constitution of this state defines the jurisdiction and powers of the district courts in the following language: "The district court shall have original jurisdiction of all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest"; and the legislature has defined the jurisdiction of the district courts in the same language. The common law was adopted by the Congress of the republic by enactment embraced in the following article—3258—of the Revised Statutes: "The common law of England (so far as it is not inconsistent with the constitution and laws of this state) shall, together with such constitution and laws, be the rules of de-

ing. The number of actions to recover damages, in early times, was, compared with later times, limited; and very few of those difficult questions as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was ordered, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute." The reply of Justice Brewer does not answer the argument of Justice Gray. The better rule was laid down in *Russell v. Men of Devon*, 2 Durn. & E. (Term Rep.) 667, where it was sought to maintain the action by argument from necessity and by reason of the analogy to other actions which were authorized by statute, but Justice Ashhurst said in that case: "It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion must have frequently happened. But it has been said that there is a principle of law on which this action may be maintained, namely, that where an individual sustains an injury by the neglect or default of another the law gives him a remedy. But there is another general principle of law which is more applicable to this case—that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." We are of the opinion that the fact that no such examination was ever authorized by a court at common law in England, is conclusive that those courts had no authority under the common law to make such order. Judge Brewer's suggestion that all persons, who were ordered by the common-law courts to be examined, must have submitted without contention, is contrary to the record of those courts, which show a stubborn resistance by the English people to every encroachment upon their personal liberty. It is more consistent with the facts to presume that lawyers and courts recognize that no such power existed, therefore there was no attempt to secure the examination.

In his dissenting opinion Judge Brewer said: "Certainly, the power ¹⁸⁰ of the courts and of the common-law courts to compel a personal examination was in many cases often exercised and unchallenged. Indeed, whenever the interest of justice seemed to require such examination it was ordered. Instances of this are familiar; and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered." The learned judge does not cite a case to support his statement of the frequency of similar proceedings in

the common-law courts of England, but we presume he refers to three exceptional cases mentioned by Judge Gray: 1. In divorce proceedings upon the ground of impotency, the court might order the examination of either party, but the exercise of this power "rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction; and is derived from the civil and canon law as administered in spiritual and ecclesiastical courts not proceeding in any respect according to the course of the common law." 2. In case a woman was convicted of a capital crime, the court might order an examination of her to determine whether she was quick with child, to prevent taking the life of the unborn infant. 3. If a widow claimed to be with child, the heir to the estate might cause her to be examined to ascertain whether she was or not with child, to protect the heirs against the fraud of having a false heir presented to inherit the estate. "But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered in any part of the United States, as suited to the habits and conditions of the people." Comments in quotation marks are from the main opinion in *Railroad Co. v. Botsford*, and furnish complete answers to the arguments based upon the exceptional cases. The exceptions are the sole reliance of all cases which uphold the authority of the court to order such an examination, for a precedent showing that the right existed and was exercised by common-law courts. They do not establish the fact, and the answers made by Judge Gray in the main opinion are so conclusive as to leave no doubt that, in truth and in fact, no such practice ever prevailed in the common-law courts of England.

Since the common law furnishes no precedent for such proceeding, we must look to our constitution and statutes for authority in our courts to order the examination. The provisions of our constitution and of our statutes with regard to the practice and jurisdiction of courts are antagonistic to the spirit and purpose of such proceedings. To make sure of the immunity of the person of citizens from improper interference by any authority, the convention which framed our constitution adopted as a part of the Bill of Rights this section 9 of article 1: "The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches, and no warrant to search any place or to seize any person or thing shall

without describing them as near as may be, nor without cause supported by oath or affirmation." Whether, is guaranty of immunity from interference ¹⁸¹ with on, the legislature might authorize the physical examination of a party to a suit, is not before us for determination, are of the opinion that our constitution secures every of this state against any seizure or search of his person s not plainly authorized by some law of this state.

organizing the district courts, the legislature has, with particularity, prescribed what its powers shall be, and the and processes which may be issued. Among other things may be done to secure testimony for the trial is the proling of interrogatories by one party to the other for the use of getting a full and complete statement of his cause tion, or ground of defense. By this method a person or ration sued for damages for personal injury may secure mplete statement of all the symptoms and a description of he external injuries for which compensation is sought. It been held by this court that the right to examine the oppo party by interrogatories is a substitute for a bill of discovery, which does not exist in our practice: Cronin v. Gay, Tex. 460; Cargill v. Kountze Bros., 86 Tex. 386, 40 Am. . Rep. 853, 20 S. W. 1015, 25 S. W. 13, 24 L. R. A. 183. ne argument that the examination may be ordered as upon a ll of discovery is fully met by the fact that we have no such roceeding.

The common-law proceeding most analogous to physical examination is the right of view, by which a party sought to have his witnesses examine the premises to qualify them to testify. "There are but two such cases reported in the English reports: Newman v. Tate, 1 Arnold, 244, and Turquand v. Strand Union, 8 Dowl. 201." The request was refused in both cases: Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, 35 L. ed. 734 It is significant that the legislature of this state after adopting the common law of England, within a short time after those cases were decided, repealed the right of view by this article, 1451 of the Revised Statutes: "All vouchers, views, essoins, and also trials by wager of battle and wager of law, shall stand repealed." Thus we see that the legislature has not only failed to provide for a physical examination of parties, but has actually repealed from the common law in this state the only proceeding that bore the slightest resemblance to it.

The claim that the duty rests upon each court to administer exact justice between parties is not supported by any authority nor is it consistent with the general law of this state, nor with the common law upon these questions. It is the province of a court to try issues formed by the pleadings of parties according to the rules of procedure, to furnish all process authorized by law to secure evidence, and to administer justice according to the evidence adduced on the trial. The common law and our statutes provide all of the means which courts are authorized to use in the administration of justice between parties, and no court has authority to originate and introduce a new process to enable parties to secure evidence in support of their cases. A court with power "to make subservient to its order all persons and things that will afford the most reliable evidence" would be an anomaly in constitutional ^{and} republican government. It is better for the common good that courts should be restrained within prescribed limits, than that judges be invested with unlimited and irresponsible power over the persons and property of the citizen.

In this state by our constitution and the common law the person of a citizen is so sacred that an officer may not disregard the right of personal freedom, even to satisfy an execution by levying upon property which is on the person of the defendant. To show the fallacy of the claim made by those that uphold the right of physical examination, we will suppose A has instituted a proceeding against B for damages on account of personal injuries inflicted by B upon the plaintiff, and the defendant asks that a committee be appointed to examine the plaintiff as to his injuries, that witnesses may be furnished to testify of his condition. The court, in order "to administer exact justice," orders the examination, takes forcible control of the person of plaintiff, and makes an examination, produces evidence, and at the trial a judgment is rendered in favor of the plaintiff against the defendant for damages. When execution issues the officer calls upon the defendant for satisfaction; but with a valuable diamond in his shirt front and ten thousand dollars in his pocket, the defendant defies the officer to make a levy. The court would have made the person of the plaintiff "subservient to its order" to enable defendant to have an examination of plaintiff's person and to use the private parts of it as evidence, but would, if called upon, enjoin the invasion of the person of defendant to satisfy its judgment—this would be the practical working of the doctrine contended

illustrations might be given of court proceedings to show the fallacy of the claim that courts in Texas to order a person to submit his or her person to examination in civil suits; but we feel it is unnecessary. It is to say, for the courts of Texas, that the authority to an examination and force a party to submit to it is neither in common law nor in the statute laws of this State, therefore, does not exist and cannot be exercised by the courts of Texas.

The plaintiff in error contends that new conditions have been introduced in connection with this class of litigation, which make it necessary for the courts to adopt this method so as to enable defendants to secure necessary evidence. In support of this contention, counsel for the plaintiff in error has injected into this argument matter which is wholly irrelevant in this case and might be more appropriately addressed to the legislature.

We cannot better express our views upon this matter than to quote from the opinion of Chief Justice Holmes of the Supreme Court of Massachusetts, in the case of *Stack v. New England R. R. Co.*, 177 Mass. 158, 83 Am. St. Rep. 269, 58 N. E. 687, 52 L. R. A. 328. "We appreciate the ease with which, if we were careless or ignorant of precedent, we might be tempted to assume that power. We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. As the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain."

It may be true that evil practices by plaintiffs in these cases have grown up; but it is equally true, that to establish such a rule of practice would place in the power of defendants in damage cases the means of annoying plaintiffs, and of intimidating the most worthy of the complainants in such suits.

At the trial of the cause, after the testimony of physicians who had treated Cluck for his injuries had been introduced, a

Cluck had, himself, testified as to his injuries and the circumstances under which he received them, the attorney for the railroad company propounded to him this question: "Are you willing, in the presence of some reputable person, or by yourself, and subsequently to be supported by your affidavit that it is urine voided by you into a vessel which is absolutely free from any foreign matter, to furnish a specimen of your urine, voided under the circumstance stated, to a committee of competent physicians to be appointed by the court, so that an analysis of that urine may be made?" To which counsel for plaintiff objected on the ground that same was irrelevant and immaterial and a useless consumption of time, which objection was by the court sustained. The same objections apply to this procedure as to that which sought a physical examination of the plaintiff. The court could not enforce such an order without taking possession of the person of plaintiff and exercising coercive power to compel him to perform the act. For the reasons before given, we hold that the objection was properly sustained.

The plaintiff, Cluck, being on the stand as a witness in his own behalf, and having testified of his injuries and their effect, the railroad company propounded to him the following question: "I will ask you whether or not a proposition has been made to you to have the court, without the suggestion of counsel for defendants, appoint a committee or board of skilled physicians to examine you physically with a view of ascertaining the nature and extent of the ailments of which you complain and their cause?" To this question counsel for plaintiff objected on the ground "that the same was incompetent, irrelevant and immaterial, and that the purpose of it was to prejudice the plaintiff's case before the jury; that the matter had already been ruled upon by the court, and could not again be inquired into; and that the right to decline to submit himself to a physical examination by physicians to be appointed by the court was a legal right." The objections were sustained by the court. In this ruling the court erred. The reason for ¹⁸⁴ refusing a physical examination of the plaintiff is not that the defendant is not entitled to have the benefit of the evidence, but because the court has no power to force the plaintiff to submit to such an examination. He has the right to submit, or refuse, but in case he should refuse the defendant is entitled to have that fact go to the jury to be considered by them in determining upon the credibility and sufficiency of the testimony upon which he

cover: Union Pac. Ry. Co. v. Botsford, 141 U. S. 255, 100 U. S. Rep. 1000, 35 L. ed. 734. If the jury should be satisfied that the refusal showed a purpose to conceal the truth, that the fact taken into account in weighing the evidence was a satisfactory reason should be given for the refusal, and if the evidence were sufficient, the refusal would not defeat a recovery. The suggestion that the court might enforce its order requiring to submit the case to a jury is not sound, for in no case is a party entitled to a trial by jury whenever he produces evidence which shows prima facie a right to recover. In the case of an unreasonable refusal to allow examination, the court should set aside the verdict, unless the evidence satisfactorily established the right.

It is claimed by the defendant in error that these matters were argued in the presence of the jury, who were fully informed of the plaintiff's refusal. That is true, but the action of the court had the effect to take it from the jury, which would neutralize any effect that the occurrence, in the presence of the jury, might have had upon their minds. It was equivalent to telling the jury that it was not to be considered by them. The defendant in error would get no benefit from the fact that the examination was asked and objected to in their presence by the plaintiff's counsel.

For the error indicated, the judgments of the district court and of the court of civil appeals are reversed and the cause is remanded.

The Physical Examination of Parties to an action by order of court is discussed in the monographic notes to Cleveland etc. Ry. Co. v. Liddleston, 68 Am. St. Rep. 242-252; Sidekum v. Wabash etc. Ry. Co., 3 Am. St. Rep. 554-557; Sioux City etc. R. R. Co. v. Finlayson, 49 Am. Rep. 726-730. The power of the court to require the plaintiff in a personal injury case to submit to an examination is recognized in Brown v. Chicago etc. Ry. Co., 12 N. Dak. 61, 102 Am. St. Rep. 564; Ottawa v. Gilliland, 63 Kan. 165, 88 Am. St. Rep. 232, and see the cases cited in the cross-reference note thereto.

WESTERN UNION TELEGRAPH COMPANY v. SWEARINGIN.

[97 Tex. 293, 78 S. W. 491.]

TELEGRAPH CORPORATIONS—Damages for Failure to Deliver Message, When not too Remote.—A telegram reading: "Green Swearingin: Come; Frank is dead. Mrs. Swearingin"—sufficiently gives notice of a death and the desire of the sender that the addressee shall attend the burial and the expectation that he will do so, and the telegraph corporation is liable if, through its negligence, the message is not delivered in time for him to attend the funeral. (p. 878.)

George H. Fearons, Stanley, Spoons & Thompson and N. L. Lindsley, for the appellant.

G. H. Goodson, for the appellee.

294 **GAINES, C. J.** This is a certified question from the court of civil appeals for the second district. The certificate is as follows:

"In the above cause now pending before this court upon a motion to certify, upon the following facts, we held that appellee's damages were not too remote but were in contemplation of the parties at the time of the sending of the message hereinafter referred to, and were properly recoverable in this suit.

"Appellee's son was killed at Fort Worth, Texas, August 1, 1899. At about 1 o'clock P. M. of that day one J. M. Stuart, acting for the wife of the deceased, delivered to appellant at its Fort Worth office the following message:

"'Fort Worth, Texas, Aug. 1st, 1899.

"'To Green Swearingin, Comanche, Texas:

"'Come; Frank is dead.

"'Mrs. SWEARINGIN.'

"Stuart paid the charges, and the company undertook the delivery of the message, but upon ascertaining that Green Swearingin did not live within the established free delivery limits of the town of Comanche, a service message was returned to the Fort Worth office to that effect, and Stuart was notified that the company would not undertake the delivery of the message to Swearingin at his home in the country without payment or guaranty of payment of the sum of two dollars extra charges. Stuart guaranteed this sum, but the message was not delivered until after the burial. If the message had been properly trans-

mitted and delivered, appellee would have received it in time to have left Comanche at 9 o'clock A. M. on August 2d, and would have notified Stuart of his departure, and would have reached Fort Worth at 1:30 o'clock P. M. of the same day, and in time to have attended the burial of his son. By reason of the failure to hear from Swearingin, however, Stuart concluded that he was not coming and buried the remains at 11 o'clock A. M. on August 2d. If Stuart had received notice that Swearingin was on his way to Fort Worth, he would have held the body until his arrival.

205 "Upon the authority of *Western Union Tel. Co. v. Norris*, 1 Tex. Ct. Rep. 685, 60 S. W. 982, in which a writ of error was refused by your honors, we held as above indicated. Appellant insists that this holding is in conflict with the holding of the honorable court of civil appeals for the third supreme judicial district in the case of *Western Union Tel. Co. v. Stone*, reported in 27 S. W. 144, and we therefore deem it our duty to grant the motion and to certify to your honors whether or not we were in error in our said holding."

We are of opinion that the court of civil appeals correctly held that the damages in this case were not too remote. The point is ruled by the decision in the case of *Western Union Tel. Co. v. Norris*, 25 Tex. Civ. App. 43, 60 S. W. 982, in which an application for a writ of error distinctly presenting the question was refused by this court. As to this matter the two cases are not distinguishable in principle.

The case of *Western Union Tel. Co. v. Stone* (Tex. Civ. App.), 27 S. W. 144, did not come to this court, but the opinion in that case is based upon the decisions of this court in *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58, 26 S. W. 490, and *Western Union Tel. Co. v. Motley*, 87 Tex. 38, 27 S. W. 52, in which it was held that the damages were too remote to authorize a recovery. In the Linn case, the telegram was: "Grace is very low. Can you come and bring Maud?" and was signed "Kate." In that case, as in this, if the message had been promptly delivered, the plaintiff could not have been present at the funeral at the time it actually took place; but it was averred and proved that if the delivery had been made according to the contract, he would have given notice of his coming and that the burial would have been postponed until his arrival. It was there held that the message was sufficient to notify the company that there was a relationship between the plaintiff and the person mentioned therein;

that the latter might die; and that he might by a failure to deliver it be deprived of the opportunity to attend the funeral. But it was also held that it did not apprise the company that "Grace," the person mentioned, had a husband; that if the message had been promptly delivered the plaintiff would have advised the latter of his coming, and that the funeral would have been postponed until his arrival. The Motley case involved the same principle as the Linn case, but, according to the testimony, the contingencies upon which the plaintiff would have succeeded in being present at the funeral were still more remote. In the Stone case, the message was: "Your mother died to-day. Funeral on Wednesday." There also the plaintiff could not have attended the funeral on the appointed day had the message been promptly delivered; but he sought to recover on the ground that if it had been so delivered, he would have sent notice of his coming and the funeral would have been delayed. There the message showed upon its face that the time of the funeral was already fixed, and the telegraph company could not properly have been held to have foreseen that any postponement was contemplated.

In the present case it seems to us the effect of the language of the ²⁰⁶ message is quite different: "Come; Frank is dead." These words give notice of the death of the person mentioned, and also indicate not only the desire of the sender that the plaintiff should attend the burial, but also a confident expectation that he would do so. Under such circumstances, we are of opinion that it ought to have been foreseen that upon the delivery of the message there might be a necessary delay in starting upon the trip, and that the plaintiff would have notified the sender of the fact, and of his coming, and the probable time of his arrival, and that the funeral would have been accordingly postponed. Such, we think, would have been the natural and probable consequences if the message had been promptly delivered, and therefore they should be held to be within the contemplation of the parties to the contract.

As is indicated by what we have already said, we answer the question in the negative.

For Authorities bearing upon the decision in the principal case, see Hendershot v. Western Union Tel. Co., 106 Iowa, 529, 68 Am. St. Rep. 313; note to Western Union Tel. Co. v. Cooper, 10 Am. St. Rep. 709. That damages for mental suffering caused by negligence in delivering a telegram may be allowed, notwithstanding the absence of physical pain or injury, see Green v. Telegraph Co., 136 F. C. 489, 103 Am. St. Rep. 955; Barnes v. Western Union Tel. Co., 7 Nev. 438, 103 Am. St. Rep. 776.

COMMERCIAL NATIONAL BANK v. FIRST NATIONAL BANK.

[97 Tex. 536, 80 S. W. 601.]

CORPORATIONS.—Representations Made by an Agent or Officer of a Corporation do not bind it, nor create a liability against it, unless concerning the business which it is empowered by its charter to do, and the agent must at the time be acting within the scope of his authority. (p. 882.)

BANKING.—"The Business of Banking is Defined to consist in discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; receiving deposits, buying and selling exchange, coin and bullion, lending money on personal security, and obtaining, issuing and circulating notes; and to these specified powers and those necessary to the exercise of the powers expressed the bank must confine its operations, and acts of officers not embraced in the terms of the law are not binding upon the corporation." (p. 883.)

NATIONAL BANKS—Ultra Vires.—An agreement by a national bank to see that a note sent to it for execution is executed by the person designated and is not a forgery, is not within the business of banking, and is ultra vires. (p. 883.)

NATIONAL BANKS—Acts of Officers of, When Personal.—The act of a president of a national bank in making a statement that a note sent to the bank to be executed by a person designated has been so executed and that the signature appearing on such note is genuine is not a transaction of or for the bank, and it cannot be held answerable to the payee if such signature proves to be a forgery. (p. 885.)

J. C. Beasley, for the plaintiff in error.

Davidson & Bailey and Lackey & Lewright, for the defendant in error.

⁵³⁹ BROWN, A. J. We copy the statement of the case and conclusions of fact of the court of civil appeals, as follows:

"This action was brought in the district court of De Witt county by the appellee against W. H. Smith and J. F. Ray to recover upon a promissory note for the sum of two thousand and sixty-six dollars and sixty-six cents, dated November 27, 1901, payable at Cuero, Texas, and alleged to have been excuted by them to the appellee. The appellee also made the appellant a party to the ⁵⁴⁰ suit and sought to recover it, against alleging that the appellant had undertaken, as the agent of appellee, to have the note sued on signed by Smith and Ray and had sent the same to appellee with the representation that it had been so signed; and that appellee had acted on such representation and

had advanced the sum of two thousand dollars on the note to Smith, against whom no recovery could be had on account of his insolvency; that Ray was solvent but claimed that the note as to him was a forgery; and that in the event the note was a forgery appellant was liable to appellee for the amount so advanced by it to Smith on account of its deceitful representations. Defendant Smith filed no answer. Defendant Ray answered under oath denying the execution of the note by him. The appellant pleaded in abatement to the venue of the suit, asserting its privilege to be sued in Bee county, where it had its domicile. It also pleaded the general demurrer; a special demurrer to the venue; a special demurrer raising the question of misjoinder; and in bar the general denial.

"The pleas to the venue and the general demurrers were overruled by the court and afterward the cause was submitted for trial to the court without a jury, and resulted in a judgment in favor of the appellee for the amount of the note and costs against Smith and the appellant and in favor of the defendant Ray. The questions presented to this court on appeal are: 1. The sufficiency of the petition to show a cause of action for deceit against the appellant; 2. The misjoinder of parties defendant; 3. Venue of the suit as to the appellant; 4. The sufficiency of the facts to show that the appellant is liable. The facts upon which the suit is founded transpired in the making of a loan of two thousand dollars by the First National Bank of Cuero, Texas, to W. H. Smith. Smith, who resided at Mineral City, in Bee county, wrote to the bank at Cuero requesting the loan and offered as surety James F. Ray, who was a wealthy stockman of Bee county and resided at Pettus in that county. Ray was vice-president and director of the appellant bank and an uncle by marriage of Smith. The Cuero bank wrote to the First National Bank of Beeville, in Bee county, its correspondent, stating that Smith had applied for the loan and had offered Ray as surety; that it was unacquainted with them, and asked about their responsibility. The First National Bank of Beeville replied in due course of mail, saying that the parties were good for the amount of money; that Smith was a merchant in good standing; that Ray was a man of property and an official of the Commercial National Bank; that Smith was a former patron of that bank, and that it was acquainted with their signatures. The Cuero bank then prepared for signature the note issued on in Cuero and mailed it with a letter to the Commercial National Bank, saying: 'A few days since we had a letter from

William H. Smith of Mineral City, Texas, making application for a loan of two thousand dollars and offering as security James F. Ray, vice-president of your bank. Will you do us the kindness to hand the inclosed note to Mr. Ray for signature by himself and Mr. Smith? ⁵⁴¹ 'Thanking you in advance,' etc. Upon receipt of this letter and the note the appellant, by its president, John W. Flournoy, mailed the note in a letter to William H. Smith, at Mineral City, requesting him to get Mr. Ray's signature and return to the writer. A letter was received returning the note as follows:

" 'Pettus, Texas, 11-20-01.

" 'The Commercial National Bank of Beeville, Beeville, Texas.

" 'Dear Sir: Inclosed find note as per request. You will please forward to the Cuero bank and tell them to place to my credit.

Respectfully,

" 'WM. H. SMITH.'

" 'The letter was opened by Flournoy in presence of the bookkeeper of the appellant bank and the signatures to the note were examined and pronounced genuine by both of them. Flournoy at once wrote a letter from Beeville to the appellee at Cuero, in which he inclosed the note and mailed it. The letter was as follows:

" 'Commercial National Bank of Beeville.

" 'Beeville, Texas, 12-2-01.

" 'First National Bank of Cuero, Cuero, Texas:

" 'Dear Sirs: Inclosed you will find note of Wm. H. Smith, properly signed up. He wants the proceeds of said note placed to his credit.

Yours truly,

" 'JOHN W. FLOURNOY,

" 'President.'

" 'The note was received and the money was advanced by the appellee to Smith. The signature of Ray to the note was found to be a forgery, but was pronounced to be a most clever one. Both Flournoy and the bookkeeper, Miller, testified that 'If the signature of Ray to this note is a forgery then it is a most expert and adroit one and calculated to deceive the most careful, and greatly did deceive this witness.'

" 'Smith belonged to a family of people who stood high in Bee county, well known for probity and honesty, and who had occupied positions of public honor and trust. William H. Smith

himself had been a young man of excellent habits, and at the time of this transaction and for a number of years prior thereto he was engaged in the mercantile business in Mineral City, in Bee county, a small village about seventeen miles northwest of Beeville. His standing and credit among business men were of the highest order. His business seemed to be successful and profitable and of large volume; and for some years he had done business with appellant, his transactions amounting in the year 1900 to seventy thousand dollars. He had the confidence of the officers of the bank and it carried him without security sometimes for as much as ten thousand dollars. Not long before this transaction the bank had loaned him five hundred dollars with Ray as surety, and the note for the money was prepared and mailed to him at Mineral City with the request to sign and get Ray's signature and then return to the bank; and the money was paid to Smith on return of the note by him. Ray lived at the little village of Pettus, about sixteen miles north of Beeville, and did business with the appellant bank, and was personally and intimately known to the officers of the bank. The correspondence of Smith and Ray with the bank had been voluminous, and Flournoy and Miller had seen them write and both testified that they were familiar with and knew their signatures, and that they had no reason or ground to suspect that either of them was forged, but believed they were genuine. The Cuero bank was not ⁵⁴² acquainted with Smith or Ray and did not know their signatures. It trusted the appellant bank to get the note signed, and believed its representation that it had been properly signed and on that account alone let Smith have the money. Appellee would not have loaned the money on Smith's signature alone. No charge was made by the appellant for the service it rendered, and the appellee did not offer or expect to pay for it, but would have done so if required. The appellant is a national bank duly incorporated under the national banking act of Congress, with its domicile at Beeville, in Bee county, Texas, and the appellee is also a national bank duly incorporated under the national banking act, with its domicile at Cuero, in De Witt county, Texas."

Representations made by an officer or agent of a corporation will not create liability upon the corporation unless the representation be made by the agent concerning a business which the corporation is empowered by its charter to do, and the agent must, at the time, be acting within the scope of his authority: Cooley on Torts, 136.

The facts alleged in the petition show that the plaintiff in error is a corporation, created under the national banking laws enacted by the Congress of the United States, hence to that law we must look to determine the kind of business in which a bank may engage. That act provides: "Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such and in the name designated in the organization certificate, it shall have power:

"7. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; receiving deposits, buying and selling exchange, coin, and bullion, by lending money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this title."

"The business of banking" is defined to consist in discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; receiving deposits, buying and selling exchange, coin and bullion, lending money on personal security, and obtaining, issuing and circulating notes; and to these specified powers and those necessary to the exercise of the powers expressed the bank must confine its operations, and acts of officers not embraced in the terms of the law are not binding upon the corporation: *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *Merchants' Nat. Bank v. Armstrong*, 65 Fed. 934; *Cooley on Torts*, 136.

The facts alleged against the plaintiff in error do not show a transaction embraced in the provisions of the law above quoted; on the contrary, it was a matter in which the Beeville bank was not interested; in fact it was a mere courtesy between the officers of the two banks, ⁵⁴³ performed gratuitously by Flournoy for the accommodation of the officers of the Cuero bank to aid them in making a loan to Smith.

If it were held that procuring the signature to a note in order that the Cuero bank might lend money to a third party was within the power and authority of the bank at Beeville, the president of the Beeville bank was not authorized to transact such business for his bank and did not bind it by the statements he made. Under the national banking law the corporation was authorized to elect a board of directors, to which was con-

mitted the management and control of the bank, and the board was empowered to select one of its members as president of the bank, of whom it is said: "It is his duty to preside at the meeting of the board of directors, and he has charge of the litigation of the bank, and other than these he has no power inherent over and beyond another director": Bolles' National Bank Act, sec. 53. The board could have adopted by-laws conferring larger powers upon the president, but the petition does not allege the existence of such by-laws, nor any fact which would extend the authority of the president so as to embrace the act upon which this action rests. The statement made by Mr. Flournoy that the note returned was signed up by Mr. Ray was without authority of the Beeville bank, therefore not binding upon it: *United States v. City Bank of Columbus*, 21 How. 356, 16 L. ed. 130; *Weckler v. National Bank*, 42 Md. 581, 20 Am. Rep. 95; *Merchants' Bank v. Marine Bank*, 3 Gill (Md.), 96, 48 Am. Dec. 300; *Crawford v. American Nat. Bank*, 67 Mo. App. 39; *Houston etc. Ry. Co. v. McKinney*, 55 Tex. 176.

United States v. Bank of Columbus, before cited, involved a state of facts much like this case. The cashier of the defendant bank gave to one of its directors, Mr. Miner, a statement that he was authorized on behalf of the bank to "contract with the Treasury Department of the United States for the transfer of money, from the east to the south and west, for the government," and upon the faith of the statement of the cashier, the Secretary of the Treasury contracted with the party named for the transfer of one hundred thousand dollars from New York to New Orleans. Miner received and cashed the draft, but the government did not receive the money at New Orleans. Upon suit by the United States against the bank, the supreme court of the United States held that the cashier had no authority to make such representations on behalf of the Columbus bank and that it was not liable for the loss sustained in consequence of reliance upon the false statement.

Crawford v. Bank is much like this case. A firm of merchants secured from the cashier of a bank a statement to the effect that the firm was "solvent and would pay for all that they would buy." Upon this statement the firm obtained credit, and having failed in business, it was sought to hold the bank responsible for the loss. The court held that the cashier had no authority to give such statement, therefore the bank was not responsible for the damages.

The act of Flournoy, who signed the statement as president of the Beeville bank, was a mere personal transaction of his own, and if any ⁵⁴⁴ liability was created thereby it rested upon him individually and not upon the bank. We do not, however, wish to be understood as intimating that the facts would give a cause of action against Flournoy; that question is not now before us.

The allegations in the plaintiff's petition presented no cause of action against the Commercial National Bank of Beeville, and the general demurrer should have been sustained. It is therefore ordered that the judgments of the district court and of the court of civil appeals be reversed as to the Commercial National Bank of Beeville only, and this cause be remanded for further trial as to said bank, but the judgments as to Ray and Smith remain in force.

The Rule that the Acts of the officers of a corporation are binding upon it only when within the scope of their authority (Rumbough v. Southern Imp. Co., 112 N. C. 751, 34 Am. St. Rep. 528) is applicable to banks: Campbell v. Manufacturers' Nat. Bank, 67 N. J. L. 301, 91 Am. St. Rep. 438. Thus, selling railroad bonds upon commission is not within the scope of the corporate powers of a national bank, and therefore no action lies against the corporation for false representations made by its teller to induce one to buy the bonds: Weekler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95.

INTERSTATE NATIONAL BANK v. CLAXTON.

[97 Tex. 569, 80 S. W. 604.]

BANKING—Liability of Banks for Moneys Deposited by Factors.—If a bank knows that a factor is insolvent and has deposited in his own name moneys belonging to his principal, it cannot appropriate such money to the payment of its debts due from the factor, and is liable to the true owners if it does so. (p. 888.)

PRINCIPAL AND AGENT.—The Relation of Principal and Agent is not Revoked by the Mere Insolvency of the Latter unless he voluntarily or involuntarily surrenders and the law assumes control of his property. (p. 889.)

BANKING—Factors, Right of to Deposit and Withdraw Moneys, When not Destroyed by Insolvency.—Though factors are known to be insolvent and to have committed an act of bankruptcy, they retain the right to do business, and, if they continue actively in business, and not subjected to legal proceedings in bankruptcy or insolvency, may deposit in bank in their own names moneys received from sales of property and withdraw them on checks payable to third persons, and the bank is not liable for honoring such check (pp. 890, 891.)

BANKING—Moneys Deposited in a Fiduciary Capacity.—A depositor, although holding money in a fiduciary capacity, may draw it out of the bank *ad libitum*. The bank is bound to honor his checks and incurs no liability in so doing as long as it does not participate in any misappropriation of funds or breach of trust. (p. 890.)

BANKS—Duties of Respecting Moneys Deposited by a Fiduciary.—The mere fact that a bank knows that moneys deposited with it have by a depositor been acquired in a fiduciary capacity does not impose on it the duty, or give it the right, to institute an inquiry into the conduct of its customer in order to protect those for whom he may hold the fund, but between whom and the bank there is no privity. (p. 891.)

Browning, Madden & Truelove, for the plaintiff in error.

Turner & Boyce, for the defendant in error.

572 WILLIAMS, A. J. Plaintiff in error brought this suit to recover of defendant in error upon his note executed to Tamblin & Tamblin and assigned by them to plaintiff. The defendant's liability upon the note is not disputed, but he claims that plaintiff is liable to him for certain moneys of his which were deposited with it by Tamblin & Tamblin and partly applied by plaintiff to their indebtedness to it, and partly drawn out by them and appropriated to their own purposes. This contention is based on the following facts: Tamblin & Tamblin were livestock commission merchants in Kansas City and plaintiff was engaged in the banking business in the same place. The business of Tamblin & Tamblin consisted chiefly in selling livestock consigned to them as factors, the amount done by them on their own account being inconsiderable. They kept an account with plaintiff, their deposits **573** consisting almost wholly of the proceeds of property thus sold for others, including their charges, which were deposited and checked out in their own name. As factors they were so employed by defendant, who resides in Texas, in selling his stock shipped them from time to time, the proceeds of which, as of sales for others, were deposited and drawn out as stated, and this course of business had been followed for a long time before the transaction out of which the present controversy arose. Plaintiff also allowed Tamblin & Tamblin to overdraw their account, taking security for their indebtedness, and large balances stood against them from time to time. On the 28th of October, 1901, plaintiff learned that Tamblin & Tamblin had sold and not accounted for a large number of cattle covered by one of its mortgages, impairing its security that it demanded and received a note for thirty thousand dollars with a mortgage on other property

to secure it. The evidence warrants the conclusion that at that time Tamblin & Tamblin were to plaintiff's knowledge insolvent, all of their property being encumbered to secure amounts due to plaintiff, and the giving of this mortgage was an act of bankruptcy on account of which, at the suit of the creditors, Tamblin & Tamblin, were on the 29th of November, 1901, adjudged bankrupts. On said 28th of October, 1901, they had for sale some cattle belonging to defendant and other people which they sold for four thousand five hundred and twenty-nine dollars and sixty-five cents, of which sixteen hundred and four dollars and forty cents were the gross proceeds of defendant's property. Payment was made by the check of the purchaser for the whole amount, payable to Tamblin & Tamblin, which check had on its face the notice "good only in payment for livestock and when drawn in favor of a Kansas City livestock commission office." This check and others were deposited with plaintiff by Tamblin & Tamblin and were credited to them upon their account late in the day after the transaction of the mortgage before stated had taken place. Defendant was present when his cattle were sold, received fifty dollars from his factors, and instructed them, out of the net proceeds, to pay off the note here sued on, of the assignment of which to the bank he was ignorant, and to remit the balance to him. Instead of doing this, Tamblin & Tamblin on the 28th, 29th and 30th of October, drew checks, as they had been accustomed to do, in favor of third parties against this deposit, by which the larger part of it was exhausted. The bank, on the 30th, applied one hundred and sixty dollars and ninety-four cents to the payment of an indebtedness of Tamblin & Tamblin's to it and subsequently paid over the remainder of the fund to the referee in bankruptcy. On the thirtieth day of October, 1901, the plaintiff refused to receive and credit further deposits to Tamblin & Tamblin, individually, but formed what is termed a "trust fund" to which moneys tendered by them were credited, and thereafter a number of deposits were made by them into that fund for defendant, which were paid to him and are not in question. By the judgments of the district court and the court of civil appeals the bank was held liable to defendant not only for the amount applied to the indebtedness of Tamblin & Tamblin to it, but also on account of the payment of their checks in favor of persons other than defendant. For ⁵⁷⁴ reasons appearing in the course of this opinion we think the judgment is correct as to the first item, but not as to the second

The reasons urged for the last-named liability may be stated thus:

Tamblin & Tamblin were insolvent at the time of the deposit and this was, or ought to have been, known to the bank; they had committed an act of bankruptcy of which the bank had knowledge, and upon which their bankruptcy was afterward adjudicated; this revoked any authority they previously had as factors to deposit in their own names money of their customers; the bank had the means of knowing when it received the deposit that the moneys so deposited belonged to others than the depositors, and when it paid their checks that they were misapplying the funds, and could have learned by proper care who were the owners of such fund. From these facts the conclusion was deduced that the bank became liable (1) by permitting Tamblin & Tamblin to deposit in their own names without authority of its owner the money of another, and (2) in paying their checks in favor of others than such owner when it had the means of knowing that by such checks they were applying the funds to their own use. If it were true that the deposit was made by the factors in their own names without authority and that the bank knew that the money belonged to others and that such a deposit was wrongful, a different question would arise from that upon which we think the decision depends.

The opinion of Judge Wheeler in the case of *Bank v. Jones*, 18 Tex. 811, is relied on to support the position that such a transaction would amount to a conversion participated in by the bank. But in that case the money with the knowledge of the bank was placed in the hands of an agent for the sole purpose of being deposited to the credit of the principal. Upon this point the opinion says: "It cannot be doubted that Dye had authority to deposit this money in bank on account of the plaintiffs; if not conferred in express terms, at least impliedly from the nature of the transaction. It was intended that it should be so deposited. That was the purpose for which it was consigned to Dye. He was but the instrument of the plaintiffs, employed by them for the purpose of employing in their behalf the agency of the bank. There was a privity between the bank and plaintiffs, and the bank became directly and immediately responsible to the plaintiffs and not merely to the agent employed by the plaintiffs in making the deposit. Being so responsible, there can be no clearer proposition than that they had no right to pass the deposit to the private account of Dye.

Whenever they did so they were guilty of a fraudulent conversion," etc. In that case the bank applied the money to its claim against Dye and it was upon that ground that the liability was at last rested, for, on page 824, the opinion further says: "If not before, there clearly was such a conversion when the defendant permitted him to appropriate it to the payment of his indebtedness, and the balancing of his account with the bank." We make these quotations not for the purpose of questioning the soundness of anything that was said in the case referred to, but only to ⁵⁷⁵ show that the views there expressed do not conflict with other authorities upon which we shall base our decision.

The present case is not one in which the deposit was made to the credit of the agents without authority. Their general authority as factors, as well as their long course of dealing with plaintiff and with the bank, plainly support the conclusion that such deposits were rightfully made. Upon this the bank had the right to rely in receiving the money. That such authority had existed is not questioned, but it is claimed that it was revoked by operation of law upon the facts which had arisen before the deposit in question was made. Authorities are cited to the effect that insolvency of a principal or agent operates a dissolution of the relation and, in case of the agent, revokes his authority: Mechem on Agency, secs. 263-267; Ewell's Evans on Agency, 92, 401; Audenried v. Betteley, 8 Allen, 302; Hudson v. Granger, 5 Barn. & Ald. 27; Ex parte Snowball, L. R. 7 Ch. 548; 1 Am. & Eng. Ency. of Law, 1227; Story on Agency, secs. 482, 486. Of this Mechem says: "Mere insolvency or inability of the principal to pay his debts when due would not have this effect. It only results from the operation of the law when, either voluntarily or involuntarily, the principal surrenders and the law assumes control of his affairs." The cases cited in these various authorities as enforcing the doctrine relied on have been examined, and in all of them the bankruptcy or insolvency referred to was of the character stated by this author. In none of them did any question like that before us arise, all of them involving questions as to rights or titles arising between assignees in bankruptcy or insolvency and others. The proposition that the agency of Tamblin & Tamblin had ceased, or that its character had changed when this deposit was made, does violence to the facts then existing. The business of their customers was still in their charge, cattle were being sold, money handled uninterruptedly as always before. The def

ant himself still employed and trusted them, and they were engaged in the active transaction of his business committed to their charge. There is no law that we know of which would forbid their employers from so employing them because they were financially embarrassed, or even insolvent, in the sense that they had not assets with which to discharge their liabilities. To say that the bank could not treat with them as still possessing the authority upon which they had always dealt is to ignore the fact that the principal himself so recognized and dealt with them. The bank could neither terminate the agency nor limit its scope. The law might do so to a large extent by seizing the estate of the agent, but it had not moved at the time the rights of these parties, inter sese, became fixed. The act of bankruptcy presented itself to the parties as a fact which might or might not be taken advantage of. Bankruptcy declared upon it might affect rights of the bank as between it and those representing the bankrupt estate, but not those of these parties fixed as between themselves before any adjudication. If it be true, as urged, that if this money had remained in the bank and been ⁵⁷⁶ paid to the assignee in bankruptcy the defendant would have had the right to reclaim it, that does not affect this case. It might be conceded that if there had been no bankruptcy and the money still remained in the bank, defendant could recover it, but that would not establish his right to recover it after it has been paid away on checks regularly drawn. We therefore hold that the deposit made by Tamblin & Tamblin was within their authority and that they thereby became depositors; and the further questions must depend upon the rules of the law regulating the relation existing between banks and such customers.

The principles governing are clearly stated in the opinion of the chief justice in the case of *Coleman v. First Nat. Bank*, 94 Tex. 607, 608, 86 Am. St. Rep. 871, 63 S. W. 867, with copious citations from leading authorities. From these authorities it is clear that a depositor, although holding money in a fiduciary capacity, may draw it out of the bank ad libitum. The bank is bound to honor his checks and incurs no liability in so doing long as it does not participate in any misapplication of funds or breach of trust. The mere payment of the money to, or upon the checks of, the depositor does not constitute a participation in an actual or intended misappropriation by the fiduciary, though his conduct or course of dealing may bring to the notice of the bank circumstances which would enable it to know he is violating his trust. Such circumstances do not im-

pose upon the bank the duty or give it the right to institute an inquiry into the conduct of its customer in order to protect those for whom it may hold the fund, but between whom and the bank there is no privity. This is clearly brought out in the leading case of *Gray v. Johnson*, L. R. 3 Eng. & Ir. App. Cas. 1, in which an executrix, by a check signed by her, as such, in favor of a mercantile firm of which she was a member, drew out of a bank a fund belonging to the estate. In the opinion of Lord Chancellor Cairns the law is thus stated: "On the one hand, it would be a most serious matter if bankers were to be allowed, on light and trifling grounds—on grounds of mere suspicion or curiosity—to refuse to honor a check drawn by their customer, even although that customer might happen to be an administrator or an executor. On the other hand, it would be equally of serious moment if bankers were to be allowed to shelter themselves under that title, and to say that they were at liberty to become parties or privies to a breach of trust committed with regard to trust property, and, looking to their position as bankers merely, to insist that they were entitled to pay away money which constituted a part of trust property at a time when they knew it was going to be misapplied, and for the purpose of its being so misapplied. I think, fortunately, your lordships will find that the law on that point is clearly laid down, and may be derived without any hesitation from the authorities which have been cited in the argument at your lordships' bar, and I apprehend that you will agree with me when I say that the result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor and drawing a check as ⁵⁷⁷ an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must in the second place, as was said by Sir John Leach in the well-known case of *Keane v. Roberts*, (1) be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed. In the only other opinion, by Lord Westbury, this statement of principle occurs: "The relation between banker and customer is somewhat peculiar, and it is most important that the rules which regulate it should be well known and carefully observed."

A banker is bound to honor an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honor his draft on any other ground than some sufficient one resulting from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust and draws a check for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the check, for if he did so he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* as a reason why he should not perform his own distinct obligation to his customer. But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit." The law is stated to the same effect in *Morse on Banks and Banking*, and he cites many cases the opinions in which sustain him: Sec. 317, and cases cited.

This case is to be distinguished from those in which a bank undertakes to acquire title to, an interest in, or benefit from a fund held in trust by a depositor. In attempting to acquire such a right or benefit the bank becomes a party to the action of the trustee and stands as any other person dealing with one holding property in a fiduciary capacity. The question of notice of the title of the person holding the property and his power over it arises, and a bank cannot any more than any other person acquire that which belongs in equity to another, if it have notice of his rights; and if it thus aid a trustee in diverting trust property from the beneficiary, it becomes liable as a wrongdoer.

Other cases to be distinguished are those in which a principal the depositor and occupies a contractual relation to the bank, but an agent ⁵⁷⁸ is given authority to draw his checks against the deposit for the benefit of the principal or of his business. In such cases the bank is not authorized to pay checks drawn by the agent for his own benefit if it knows, or, it is sometimes said, if it have good reason to know the fact. It is mainly from discussions in opinions discussing these two classes of cases that

The courts below reached the conclusion that it was the duty of the bank to avail itself of the means it had of knowing of the misappropriation of defendant's money by his agents: *Wolfe v. State*, 79 Ala. 206, 58 Am. Rep. 590; *Gerard v. McCormick*, 10 N. Y. 266, 29 N. E. 115, 14 L. R. A. 234; *Duncan v. Hudson*, 15 Wall. (82 U. S.) 165, 21 L. ed. 145; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. ed. 693; *Union etc. Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. Rep. 118, 34 L. ed. 724; *Duckett v. Mechanics' Nat. Bank*, 86 Md. 400, 63 Am. St. Rep. 513, 38 Atl. 983, 39 L. R. A. 84; *Union etc. Bank v. Moore*, 79 Fed. 705, 25 C. C. A. 150; *Mechanics' etc. Bank v. Clifton Mfg. Co.*, 56 S. C. 320, 33 S. E. 755.

In other cases cited money was deposited to the credit of one person and drawn out by another without authority, and in still others the original deposits were held to have been wrongfully entered in the name of one who was not the owner of and not authorized to so deposit the fund. This case is distinguishable from all of those by the fact that the deposit was rightfully entered in the name of Tamblin & Tamblin, from which arose the power in them which the bank was bound to recognize, of drawing it out by their personal checks. The principles laid down clearly make the bank liable for the sum applied to the debt of Tamblin & Tamblin. As to the sums paid out on checks, the most that is claimed is that the facts brought to the attention of the bank furnished it with the means of knowing that the money in question belonged to defendant and that, in checking it out, his agents were misappropriating it. That, as we have seen, is not enough to make the bank liable further than stated. The judgment will therefore be reversed and judgment will be here rendered for plaintiff for the amount of the note less a credit of one hundred and sixty dollars and ninety-four cents applied as of date October 30, 1901, and for all costs of suit.

A Bank Which Receives from an Agent for deposit in his own name the money of his principal, without notice of the agency, is protected in applying it to a past debt due of the depositor to the same extent as in paying it out upon his checks, whenever such application is authorized by the agent: Kimmel v. Bean, 68 Kan. 598, ante, p. 415.

A Bank has a Right to Assume that money deposited by a trustee will be properly applied under the trust. It may, therefore, lawfully pay checks signed by him, whether signed in his representative capacity or not: American Trust etc. Co. v. Boone, 102 Ga. 202, 6 Am. St. Rep. 167. See, too, Duckett v. Mechanics' Nat. Bank, 86 Md. 400, 63 Am. St. Rep. 513; Patterson v. Marine Nat. Bank, 13 Pa. St. 419, 17 Am. St. Rep. 778.

FORT WORTH AND RIO GRANDE RAILWAY COMPANY v. GLENN.

[97 Tex. 586, 80 S. W. 992.]

NUISANCE, Who may Maintain an Action for.—One who, as a member of his father's family, is on premises injuriously affected by a nuisance, without having any property right there, can maintain an action for damages on account of sickness and discomfort resulting to him from the nuisance. (p. 895.)

West, Chapman & West and Theodore Mack, for the appellant.

H. D. Payne, for the appellee.

⁵⁸⁷ GAINES, C. J. This is a certified question from the court of civil appeals of the second district. The statement and question are as follows:

"This suit was brought by John Glenn, an infant two or three years old, by his father as next friend, Felix P. Glenn, to recover from appellant one thousand dollars as damages for personal injuries sustained under the circumstances stated below, and resulted in a verdict and judgment in his favor for four hundred and fifty dollars, from which this appeal is prosecuted by the railway company.

"Various errors have been assigned to the proceedings in the court below, but we have been unable to sustain any of the assignments. It is earnestly insisted, however, that there is a fundamental error requiring the judgment to be reversed, and as the contention is sustained by a decision of the court of appeals of New York, and as there are other cases pending involving the same question, in which, as in this case, our jurisdiction is final, we have been urged to certify the question to your honors, and have finally concluded that it is our duty to do so.

"The petition alleged, and the evidence tended to prove, that appellant allowed an old well on its right of way near the residence of said Felix P. Glenn, the father of appellee, to become filthy as to create a nuisance and to make appellee sick, causing him discomfort and pain. The contents of the well, besides water, consisting, as alleged, and as ⁵⁸⁸ the evidence tended in the measure to prove, in burned cotton, cotton bagging and dogs, rabbits, cats, chickens and snakes. In other words,

we interpret the record, the case made was one of nuisance defined in article 423 of our Penal Code.

"The question which we deem advisable to certify, then, is whether appellee, who was on the premises injuriously affected by the nuisance merely as a member of his father's family, without having any property right there, could maintain an action for damages on account of the sickness and discomfort resulting to him from the nuisance. In other words, whether such an action is maintainable by any person other than the owner or occupant of the premises injuriously affected; the supreme court of New York, in the case of *Kavanaugh v. Barber*, 59 Hun, 60, 12 N. Y. Supp. 603, having decided the question one way, and the court of appeals in the same case, 131 N. Y. 211, 10 N. E. 235, 15 L. R. A. 689, having decided it the other, holding, as we understand the decision, that where the claimant has no property right to be protected from infringement, he cannot maintain an action for damages caused either by a public or private nuisance, which decision, in a more recent case coming before that court, was cited with approval. In this connection see, also, *Sedgwick on Damages*, sec. 946; *Bishop on Noncontract Laws*, secs. 411, 424; *Lockett v. Ft. Worth etc. Ry. Co.*, 78 Tex. 211, 14 S. W. 564. We are not aware that the precise question was ever passed upon by the supreme court of this state."

We are of the opinion that the question should be answered in the affirmative. We do not regard the decision in the case of *Lockett v. Ft. Worth etc. Ry. Co.*, 78 Tex. 211, 14 S. W. 564, as having any bearing upon the question. In that case the plaintiff brought an action against the railroad company, in his own behalf and that of his minor children, for causing water to stand and become stagnant near his residence so as to become "hurtful to the health of himself and children and highly offensive both to sight and smell." An exception on account of the misjoinder of his children was sustained and it was agreed that the action should proceed in his own behalf without amending the petition. He was tenant of the premises upon which he resided, and it was held that, if the facts alleged by him were true, the company was liable to him "for an injury resulting to himself . . . and the loss of the services of his minor children brought about by sickness caused by the nuisance . . . and for expenses necessarily incurred on account of the sickness caused." The right of the children to recover was therefore not involved in that decision.

The case of *Kavanaugh v. Barber*, 59 Hun, 60, 12 N. Y. Supp. 603, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689, is now nearly in point. In that case the plaintiff resided with his family in a house which was the property of his wife, and brought suit against the defendant for a nuisance alleged to have been created by the latter. He claimed damages for the discomfort caused to himself and family, for sickness of his wife and children also alleged to have been caused by the nuisance, and for expenses incurred by reason thereof. In their decision the court of appeals of New York state ^{see} the question to be decided by them in the following language: "The question presented is whether, under the circumstances, a private action can be maintained by the husband for the discomforts caused by the offensive vapors." It would seem from this, that, notwithstanding the broad allegations in the statement of the plaintiff's cause of action, the evidence upon the trial narrowed the case to one of the mere discomfort of the plaintiff resulting from the nuisance. The opinion throughout indicates that the court did not have in mind a case where one not the owner of premises affected by a nuisance had been made sick by noxious gases and the like. Therefore, the question there decided and that certified to us are quite distinguishable.

In the subsequent case of *Hughes v. City of Auburn*, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636, *Kavanaugh v. Barber* is cited with approval. In that case the plaintiff, as administratrix of the estate of her daughter, brought suit under the New York statute against the city for injuries resulting in the death of the intestate, who was her daughter. The mother was the owner of the premises where she and her daughter resided; and it was claimed that the death of the latter was caused by the negligence of the city in permitting the escape of sewage from its sewer pipes into the cellar of the house in which they made their home. It was held that the plaintiff could not recover, but, as we understand the opinion, the decision, in the main at least, rested upon the ground, that, since the maintenance of the sewer by the city was a governmental function, the city could not be held responsible for an injury to health resulting from negligence on its part with respect thereto. This decision was by a divided court.

But the question before us was distinctly decided, adversely to our views, in the case of *Ellis v. Kansas City R. R. Co.*, 63 Mo. 131, 21 Am. Rep. 436. There a husband and his wife resided in a house which was the property of the husband. The

husband having died, the wife brought suit against the railroad company, claiming that in the operation of its trains the company had killed a horse on its track and had permitted the carcass to remain upon its right of way, in front of and very near to the house occupied by the plaintiff, until by reason of its decomposition the surrounding atmosphere became so noxious and offensive as to cause her to become seriously sick. It was held that by reason of the fact that the wife was not the owner of the premises occupied by her and her husband, she had no right of action. The opinion in the case concedes that if she had a property right in the premises she might have recovered.

With due respect to the learned court that decided that case the result reached seems to us illogical. If a suit be brought for an injury to real estate caused by a nuisance it is clear that the plaintiff must show that he has some right which has been injuriously affected. If the damage be to the right of those occupying the property at the time, he must prove title, or at least a right of occupancy. If it be of such permanent character as to cause damage to an estate in reversion or remainder, the reversioner or remainderman, if he sue, must prove his title as such. But why should the owner of a house be allowed to recover damages ⁵⁹⁰ for being made sick by a nuisance created in the vicinity thereof, and another lawful occupant be denied a remedy for a like reason? Let us recur to the case of *Ellis v. Kansas City R. R. Co.*, 63 Mo. 131, 21 Am. Rep. 436, as an example. There the carcass of the horse was a nuisance temporary in its character, and it could hardly be held that it diminished the value of the property which belonged to the plaintiff's husband to any appreciable extent. If he had been made sick, in what respect would his damages have differed in character from those of his wife in the actual case?

In *Hunt v. Lowell Gas Light Co.*, 8 Allen, 169, 85 Am. Dec. 697, two cases for injuries to the health of plaintiffs were tried together. The plaintiffs were visitors at a house, where they were made sick by gas permitted to escape by the defendant company; and a judgment in their favor was affirmed. So in the case of *Holly v. Boston Gaslight Co.*, 8 Gray, 123, 69 Am. Dec. 233, the suit was in behalf of a child who was made sick by the escape of gas in the house of her father. The jury decided against her either upon the question of negligence on part of the defendant company, or on account of contributory negligence on part of her father (whose negligence the court held should be imputed to her), and the verdict was sustained. But

her right to sue if the company had been negligent and there had been no contributory negligence was not questioned.

It seems to us that a conflict of opinion upon this question has arisen from confusing the damage which results to property from a nuisance, with that special damage, such as sickness, which may result to an individual from a nuisance either public or private.

For Authorities in this series bearing upon the decision in the principal case, see Ellis v. Kansas City etc. R. R. Co., 63 Mo. 131, 21 Am. Rep. 436; Hunt v. Lowell Gas Light Co., 8 Allen, 169, 85 Am. Dec. 697; Holly v. Boston Gas Light Co., 8 Gray, 125, 69 Am. Dec. 233.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

THOMPSON v. FAIRBANKS.

[75 Vt. 361, 56 Atl. 11.]

BANKRUPTCY—Attachments—Vacation—Liens.—If property of a bankrupt subject to a chattel mortgage is attached within four months of the filing of the petition in bankruptcy, and the attachment is vacated by the debtor's discharge without any order of court preserving the attachment lien for the benefit of the estate of the debtor as provided for by the national bankruptcy act, the property, unless exempt, did not pass to the trustee in bankruptcy, but is properly held under the prior chattel mortgage lien. (pp. 902, 903.)

CHattel MORTGAGES—Description of Property.—If a chattel mortgage describes the property as the mortgagor's livery property, together with after-acquired property, consisting of all horses and other livery property that the mortgagor may purchase in his business or acquire by exchange, the mortgage is a valid conveyance of such after-acquired property, after the mortgagee has taken possession with the consent of the mortgagor, as to the latter's creditors. (p. 904.)

BANKRUPTCY—Chattel Mortgages—Fraudulent Transfers.—If property covered by a chattel mortgage is delivered to the mortgagee by the mortgagor while the latter is insolvent, the transfer is not invalid under the national bankruptcy act, providing that transfers by a bankrupt with intent to hinder, delay and defraud his creditors shall be void, except as to purchasers in good faith for a fair consideration, unless it is clearly shown that such insolvent, in thus transferring the mortgaged property to the mortgagee, intended to hinder, delay or defraud any of his creditors. (p. 905.)

BANKRUPTCY—Chattel Mortgages—Preferences.—If a chattel mortgagee takes possession of property under a mortgage executed more than seven years prior to the enactment of the national bankruptcy act, and within four months prior to the mortgagor being adjudged a bankrupt, such transfer does not constitute a preference to a creditor within the meaning of such bankruptcy act, unless it clearly appears that the mortgagee or his agent had reasonable cause to believe that the transfer was intended to give him a preference. (p. 905.)

BANKRUPTCY—Chattel Mortgage—Preferences.—A chattel mortgage under which the mortgagee has taken possession with the mortgagor's consent is valid as against his trustee in bankruptcy, unless such possession was taken to afford a preference, although taken within four months prior to the date of the mortgagor's petition in bankruptcy, and with knowledge of his insolvency, and although when possession was taken the property was subject to an attachment which was invalidated by the bankruptcy proceedings. (pp. 904, 905.)

BANKRUPTCY—Chattel Mortgage—Lien.—Under the national bankruptcy act, providing that liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition against him in bankruptcy are void in case he is adjudged a bankrupt, and that the property affected is released from such lien and passes to the trustee in bankruptcy, the lien acquired by a chattel mortgage on property of a bankrupt, by a mortgage executed more than four months prior to the filing of the bankruptcy petition, being one obtained by contract and not by legal proceedings, is not voided, though such mortgage is enforced by the mortgagee taking possession of the property, with the mortgagor's consent, within four months prior to the filing of his petition in bankruptcy. (p. 905.)

CHATTEL MORTGAGES—Title Acquired by Forfeiture.—At common law a chattel mortgagee after forfeiture acquires an absolute title to the chattels, and on his taking possession, such title becomes operative against the other creditors of the mortgagor. (pp. 906, 907.)

CHATTEL MORTGAGES—Sale of Property—Equity of Redemption.—A sale of chattels under a common-law mortgage by the mortgagee with the mortgagor's consent, operates as a formal foreclosure of the latter's equitable right of redemption. (p. 907.)

CHATTEL MORTGAGES—Description of Debt.—In an action involving the validity of a chattel mortgage if the mortgagee elects to treat it as a common-law mortgage, the sufficiency of an affidavit describing the mortgage debt is immaterial. (p. 908.)

CHATTEL MORTGAGES—Description of Debt.—If a chattel mortgagee elects to treat his mortgage as a common-law mortgage, the sufficiency of the description of the debt and obligation, intended to be secured thereby, is governed by the rules applicable to real estate mortgages. (p. 908.)

CHATTEL MORTGAGES—Future Indebtedness.—A chattel mortgage conditioned to secure the mortgagee for the payment of all debts then owed by the mortgagor to the mortgagee or which he might thereafter owe him by note, book account, or in any other manner, is sufficient to include a subsequent debt arising for rent of buildings. (p. 908.)

CHATTEL MORTGAGES—Future Indebtedness.—A chattel mortgage conditioned to secure the mortgagee for the payment of all debts then owed by the mortgagor to the mortgagee, or which he might thereafter owe him by note, book account, or in any other manner, is sufficient to cover the liability by the mortgagee as surety on one of the mortgagor's notes. (pp. 908, 909.)

Porter & Thompson, for the plaintiff.

Blodgett and J. Ross, for the defendant.

364 WATSON, J. Some time before June 22, 1886, the bankrupt, Herbert Moore, bought a livery stock and business in St. Johnsbury village. In part payment therefor he assumed a mortgage then outstanding on the property. The business then was and continued to be carried on in buildings leased of the defendant. Shortly before March 1, 1888, the defendant assisted Moore to pay the assumed mortgage by signing a note with him for fourteen hundred and twenty-five dollars payable to the Passumpsic Savings Bank of St. Johnsbury. Defendant also signed other notes with Moore—one for three hundred and fifty dollars, dated July 15, 1890, payable to the same bank, and two notes payable to the First National Bank of St. Johnsbury, one for seven hundred and fifty dollars dated June 22, 1886, and one dated June 23, 1889. The sum for which this last note was given does not appear. On April 15, 1891, Moore gave the defendant, as security, a chattel mortgage on the livery property, and it was recorded on the eighteenth day of the same month. The description of the property on the mortgage is: "All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, ³⁶⁵blankets, etc. Also all horses and other livery property that I may purchase in my business or acquire by exchange." The mortgage is conditioned for the payment of all that the mortgagor then owed the mortgagee, or might thereafter owe him, "by note, book account, or in any other manner," and for the saving of the mortgagee "harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my [the mortgagor's] benefit as surety, indorser or otherwise." On May 5, 1891, defendant signed another note with Moore, payable to the Passumpsic Savings Bank, and on March 1, 1900, the three notes given to that bank by Moore with the defendant as signer, as before stated, were merged in a note of that date signed by Moore and by the defendant as surety, for two thousand five hundred and ten dollars and seventy-five cents, payable to the bank on demand. This note has not been paid, and, although specified in the condition of the mortgage assigned to the bank as one of the debts secured thereby, it has been proved by the bank as an unsecured claim against the bankrupt estate. The defendant signed other notes with Moore from time to time, in renewal and otherwise, payable to the First National Bank. After deducting payments made on the notes to the last-named bank, the aggregate sum due thereon was put into a new note dated November 21, 1892.

amount of the same was. This was amounting to five hundred and twenty-five dollars and seventy-seven cents was paid by the defendant in June, 1901. These notes were all signed by the defendant to secure Moore in carrying on, including up, and carrying on the business and other matters and as between them entered to Moore in part. In March 1, 1900, Moore was the defendant in a mortgage on the property and the mortgage was assigned by the defendant to the Passumpsic Savings Bank by which it has since been held and now. In May, 1900, one John Ryan, a creditor of Moore, made it with another firm declaring in such manner for five hundred dollars in damages, and when he came to a point attached thereon. On the sixteenth day of the same month the defendant acting under the advice of his attorney and with the consent of Moore took possession, that is mortgage of said property if all the property then in said and in the seventh day of June following he caused the same to be sold in public auction by a public officer in the town under the provisions of the statute. By arrangement between the plaintiff and the defendant's attorney the property was then to be sold and the assets held by the officer in the sale of the property for the one who should prove to be entitled thereto. But neither Moore nor his attorney consented that the funds might be applied to the defendant's debts. On the thirteenth day of June, Moore filed his voluntary petition in bankruptcy. He was adjudged a bankrupt thereon, and the plaintiff was appointed trustee in bankruptcy of the estate, and he is now acting as such.

The petition in bankruptcy was filed within four months after the giving of the mortgage assigned to the Passumpsic Savings Bank, hence that mortgage became null and void under Bankruptcy Laws of July 1, 1898, chapter 541, section 67e, 30 Statutes 546 (U. S. Comp. Stats. 1901, p. 3449). For the purpose of defeating the effect of defendant's taking possession of the property under the mortgage, the plaintiff brought his action to the court of bankruptcy, under the provisions of subdivision 47 of that section. 30 Statutes 565 (U. S. Comp. Stats. 1901, p. 3450) for an order that Ryan's attachment might be preserved as a lien on the property for the benefit of the estate in bankruptcy; but, upon hearing, the petition was dismissed. Since the attachment was made within four months prior to the filing of the petition in bankruptcy, ³⁰⁷ the lien created thereby could be preserved only by an order from that

court for such purpose. Without such order the attachment, like the last-named mortgage, became null and void: Sec. 67f. With the bank's mortgage and the attachment thus invalidated, the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given nor attachment made. It is urged that with the annulment of the attachment the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of section 67f. There would be more force in this contention were it not for the provision that, by order of the court, an attachment lien may be preserved for the benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for, on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such an order is necessary. We think such is the purpose of that provision, and that, unless the lien is thus preserved, the property, as in the case at bar, may be held upon some other lien and not pass to the trustee: *In re Sentenne & Green Co.* (D. C.), 120 Fed. 436.

The question then arises whether the defendant, by virtue of his mortgage and the taking possession of the property thereunder, had a lien on the property taken and sold, paramount to the rights of the plaintiff as trustee under the bankrupt law. The plaintiff contends that the defendant did not have a lien valid against creditors under that act, and he seeks to recover the amount received by the defendant from the sale of the property. The parties to the mortgage are described therein as of St. Johnsbury, etc. Beyond what may be inferred ³⁶⁸ from this fact, there is nothing in the mortgage showing where the property was located. The referee found that at the time this mortgage was given it was agreed and understood by the parties thereto that the mortgagor should sell or exchange any of the livery stock covered by the mortgage as he desired, and should thereby, and by purchase or otherwise, keep the stock good, so that the defendant's security should not be impaired, and that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein; that, pursuant to such understanding and agreement, the mortgagor made sales, purchases and exchanges of livery stock to such an extent that on May 16, 1900, when the defendant took possession of the property under his mortgage, there only remained

two certain horses of the property on hand at the time the mortgage was given; that these sales, exchanges and purchases were made by the mortgagor, sometimes without communication with or advice from the defendant, and frequently after consultation with him; that the livery stock as it existed when the defendant took possession of it was all acquired by exchange of the original stock, or with the avails of the old stock sold, or the money derived from the business; and that all the property of which the defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage.

The plaintiff contends that the mortgage is void because (1) the description of the property is insufficient; (2) in neither the condition nor the affidavit is the description of the debt as specific as the law requires; also that the mortgage was invalid as to the after-acquired property. However the law might be upon these questions, if the mortgagor had retained possession of the property until after the filing of the petition ³⁰⁰ in bankruptcy, there would seem to be but little doubt regarding it as the case stands. The property expressly described in the mortgage was the mortgagor's livery property, and the after-acquired property was, by the description, all horses and other livery property that he might purchase in his business or acquire by exchange. In principle there is no difference between a mortgage on such livery property with acquisitions by purchase or exchange to keep the property in quality and value equal to what it was when the mortgage is given, and a mortgage on a stock of goods with acquisitions by purchase to keep the stock from depletion by sales in the common course of business. That the mortgage in question is good at common law between the parties to it, and that when the mortgagee took possession of the property under it, with the consent of the mortgagor it became a good and valid mortgage on the property, including that acquired subsequent to the giving of the mortgage, except as against intervening rights of creditors or other third persons, if any, and that such property came under the cover and operation of the mortgage as of its date, are questions too well settled in this state to need further discussion; *Peabody v. Landon*, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781; *Rice v. Hulett*, 63 Vt. 321, 22 Atl. 75; *In re Allen's estate*, 65 Vt. 392, 26 Atl. 591; *McLoud v. Wakefield*, 70 Vt. 18, 43 Atl. 179.

It is found that when the defendant took possession of the property he knew that the mortgagor was insolvent, and was considering going into bankruptcy; that he did not intend to perpetrate any actual fraud on the other creditors or any of them, but that he did intend thereby to perfect his lien on the property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. He then understood that Ryan's attachment would ³⁷⁰ probably hold good against his mortgage. There is no finding that the thus parting with the possession of the property by the mortgagor was with the purpose on his part to hinder, delay or defraud his creditors, or any of them. Without a finding to this effect, it cannot be said that there was any invalid transfer of the property within the provisions of section 67e of the bankrupt law: *Sabin v. Camp* (C. C.), 98 Fed. 974.

The plaintiff further contends that such transfer constituted a preference within the meaning of that law. Section 60, subdivision a, 30 Statutes, 562 (U. S. Comp. Stats. 1901, p. 3445), declares what shall constitute a preference, and subdivision "b" provides that if a bankrupt shall have given a preference within four months before the filing of a petition, or after it is filed and before the adjudication, "and the person receiving or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." It is unnecessary, however, to determine whether the taking possession of the property by the defendant under this mortgage with the consent of the mortgagor was a preference under subdivision "a," for if it was, it is not voidable by the trustee, under subdivision "b," unless the defendant or his agent had reasonable cause to believe that it was intended thereby to give a preference: *Pirie v. Chicago Title etc. Co.*, 182 U. S. 438, 21 Sup. Ct. Rep. 906, 45 L. ed. 1171.

The mortgage under which the defendant acted was given more than seven years before the enactment of the bankrupt law. The case shows that possession was not taken until after the condition was broken, for it is found that at that time there was due the defendant on open account, for rent overdue, two hundred and sixty nine dollars and nineteen cents. As a mortgage under the common law, when the condition was not duly performed, the whole title to the ³⁷¹ property vested absolutely at law in the mortgagee, subject to the mortgagor's right in

equity to redeem, the same as in the case of a mortgage of lands: 2 Story's Equity Jurisprudence, sec. 1030; Wood v. Dudley, 8 Vt. 430; Blodgett v. Blodgett, 48 Vt. 32. And the defendant had the right to perfect his title against creditors of the mortgagor by taking possession of the property: Coty v. Barnes, 20 Vt. 78.

There is no finding that the defendant or his agent had reasonable cause to believe that by the change of possession it was intended to give a preference. This fact must affirmatively appear. We cannot infer it from the other facts reported: Darby v. National Bank, 57 Vt. 370. The fair construction of the findings is that the parties were but carrying out the provisions of the contract of mortgage as it was well understood between them before the bankrupt act was passed, with a view to their respective rights under the contract, rather than any preference was intended by either. Nor does the property covered by defendant's mortgage pass to the trustee under the provisions of subdivision "f," whereby all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, are deemed null and void in case he be adjudged a bankrupt, and the property affected thereby is deemed wholly discharged and released from such lien and passes to the trustee as a part of the estate.

The question of intent does not arise under these provisions, but to come within them the lien in question must have been obtained through legal proceedings within the prohibited period. It cannot be said that the creation of a lien is the same as the enforcement of one already created. Assuming that the taking and sale of personal property by a public officer ³⁷² upon a statutory chattel mortgage under the provisions of Vermont Statutes, 2265-2268, constitutes a legal proceeding within the meaning of the above provisions of the bankrupt law, as was recently held by Wheeler, J., in *In re Parker P. Ball, Bankrupt* (D. C.), 123 Fed. 164, it does not follow that the mortgage lien is thereby rendered null and void; for, instead of being a lien obtained through such legal proceedings, it is an existing lien by contract enforced by them.

As already seen, the defendant's lien under this mortgage at common law was one that gave him an absolute legal title after seizure, which occurred before possession was taken by him. It was necessary that a change of possession be had to render

his title operative against the other creditors of the mortgagor: *Tobias v. Francis*, 3 Vt. 425, 23 Am. Dec. 217; *Woodward v. Gates*, 9 Vt. 358; *Rice v. Hulett*, 63 Vt. 321, 22 Atl. 75. After forfeiture the defendant had the right to sell the property in satisfaction of his debts: *Wood v. Dudley*, 8 Vt. 430; *Jones on Chattel Mortgages*, sec. 707; *Freeman v. Freeman*, 17 N. J. Eq. 44. And the sale being with the mortgagor's consent, operated as a formal foreclosure of his equitable right of redemption: *Jones on Chattel Mortgages*, sec. 709.

The construction of section 67f has recently been under consideration in the case of *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. Rep. 67, 47 L. ed. 122, 9 Am. Bankr. Rep. 36. In an opinion delivered by Mr. Chief Justice Fuller, the court said: "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months, the property is discharged thereupon, but not otherwise. A judgment ³⁷³ or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditors' bill would be entirely immaterial."

Nor is the case of *Wilson v. Nelson*, 183 U. S. 191, 22 Sup. Ct. Rep. 74, 46 L. ed. 147, upon which the plaintiff relies, to the contrary. There, Nelson borrowed the sum of money before the bankrupt law was enacted, and gave his promissory note therefor, with an irrevocable power of attorney executed by him attached thereto, authorizing any attorney of a court of record in his name to confess judgment thereon after its maturity. After the passage of the bankrupt act, the owner of the note caused judgment to be entered upon the note and the warrant of attorney. Upon this judgment an execution was issued, and the same was levied on Nelson's goods, which were subsequently sold, and the proceeds were applied in part payment of the judgment. These proceedings were wholly without Nelson's knowledge or consent. More than five days after the levy, but before the sale of the goods, a petition in bankruptcy was filed against Nelson, and the sole question before the court was whether he had committed an act of bank-

ruptcy within the meaning of section 3, clause 3 (30 Stats. 546, U. S. Comp. Stats. 1901, p. 3422), of the bankrupt law. In considering the case, the court discussed to some extent the provisions of section 67, subdivision "f." In that case, unlike the one at bar, no lien existed upon the bankrupt's property until one was created by the levy of the execution, which brought it expressly within the terms of subdivision "f." It is there said that the bankrupt act makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact; and that the levy, which was in a proceeding begun within the four ³⁷⁴ months, would be dissolved by the adjudication in bankruptcy, because its existence and enforcement would work a preference; and it was held that the debtor, by failing to vacate or discharge the preference within five days before the sale of the property on the execution, committed an act of bankruptcy.

Some or all of the amount due from the mortgagor to the defendant for rent of buildings accrued after the giving of the mortgage, and the plaintiff contends that so much thereof as did thus accrue is not covered by the mortgage, because rent is not a "contemplated loan and liability" within the meaning of that expression in the affidavit attached to the mortgage. But when the defendant is considered as standing upon a mortgage, at common law, no affidavit is necessary; and regarding the sufficiency of the description of the debts, obligations and undertakings intended to be secured thereby, the rules governing similar questions arising in connection with real estate mortgages are applicable. Under the holdings of this court in cases involving such mortgages, it is clear that the description is sufficient in this regard: *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Seymour v. Darrow*, 31 Vt. 122; *Soule v. Albee*, 31 Vt. 142.

Nor can we agree with the plaintiff's contention that the defendant cannot avail himself of this security to save him harmless and indemnified from paying the note for two thousand five hundred and ten dollars and seventy-five cents at the Passumpsic Savings Bank, signed by him as surety, because the defendant's liability thereon is not more specially described in the mortgage. In this respect the condition of the mortgage is more specific than the one before the court in *Soule v. Albee*. There the condition was, "should also pay all sums that the petitioners or A. G. Soule should become liable to pay for Curtis B. Albee in consequence of signing or otherwise." This

condition was held sufficient to cover an agreement ³⁷⁵ whereby the mortgagee, at the mortgagor's request, verbally agreed with the mortgagor's debtor, who had been summoned as a trustee in a suit against the mortgagor, that if said debtor would pay his debt to the mortgagor, he, the mortgagee, would pay him whatever judgment should be rendered against him as trustee in that suit. Whether the description meets the requirements of the law regarding statutory chattel mortgages, we need not inquire. The defendant cannot be deprived of his security in that behalf until the note at the bank has been paid, or he has in some other manner been fully discharged or released as surety thereon.

In considering the questions before us, we have treated all evidence introduced by the plaintiff, to which defendant excepted, as properly in the case, without regard to its legal admissibility.

The pro forma judgment for the defendant to recover his costs is affirmed.

The Principal Case was carried by writ of error to the supreme court of the United States, where the judgment of the state court was affirmed: *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. Rep. 306. Mr. Justice Peckham delivered the opinion as follows: "This is a contest between a trustee in bankruptcy, representing the creditors of the bankrupt, and the defendant, the mortgagee in a chattel mortgage, dated and executed April 15, 1891, and duly recorded April 18th of that year. The defendant has paid some five hundred dollars of the indebtedness of the bankrupt for which defendant was liable as indorser on a note, and he remains liable to pay the note of two thousand five hundred and ten dollars and seventy-five cents, held by the Passumpsic Savings Bank, which was signed by him as surety.

"The property taken possession of by the defendant under the chattel mortgage was sold by a deputy sheriff on the 11th of June, 1900, and the net avails of the sale, amounting to nine hundred and twenty-two dollars and eight cents, have been paid over by the officer who made the sale, to the defendant.

"This suit is brought by the trustee to recover from the defendant those net avails on the theory that the action of the defendant in taking possession and making the sale of the property was unlawful under the provisions of the bankrupt act.

"The defendant had assisted the bankrupt in the purchase of the property and had indorsed notes for him in order to enable him to carry on the business of conducting a livery-stable. This mortgage, to secure him for these payments and liabilities, was given some seven years before the passage of the bankrupt act, and at the time

it was given it was agreed by the parties to it that the bankrupt might sell or exchange any of the livery stock covered by it, as he might desire, and should, by purchase or exchange, keep the stock good, so that the defendant's security should not be impaired, and it was also agreed that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein.

"Under this agreement the bankrupt made sales, purchases, and exchanges of livery stock to such an extent that on May 16, 1900, there remained but two horses of the property originally on hand. The stock as it existed on the above date was all acquired by exchange of the original stock, or with the avails of the old stock sold, or the money derived from the business.

"There is no pretense of any actual fraud being committed or contemplated by either party to the mortgage. Instead of taking possession at the time of the execution of the mortgage, the defendant had it recorded in the proper clerk's office, and the record stood as notice to all the world of the existence of the lien as it stood when the mortgage was executed, and that the defendant would have the right to take possession of property subsequently acquired, as provided for in the mortgage. The bankrupt was, therefore, not holding himself out as unconditional owner of the property, and there was no securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien, and if defendant cannot secure the benefit of this mortgage, which he obtained in 1891, as a lien upon the after-acquired property, yet prior to the title of the trustee for the benefit of creditors, it must be because of some provision of the bankruptcy law, which we think the court ought not to construe or endeavor to enforce beyond its fair meaning.

"In Vermont it is held that a mortgage such as the one in question is good. The supreme court of that state has so held in this case, and the authorities to that effect are also cited in the opinion of that court. And it is also there held that when the mortgagee takes possession of after-acquired property, as provided for in this mortgage, the lien is good and valid as against everyone but attaching or judgment creditors prior to the taking of such possession.

"At the time when the defendant took possession of this after-acquired property, covered by the mortgage, there had been a breach of the condition specified therein, and the title to the property was thereby vested in the mortgagee, subject to the mortgagor's right in equity to redeem. This has been held to be the law in Vermont (aside from any question as to the effect of the bankrupt law), both in this case and in the cases also cited in the opinion of the supreme court of Vermont. The taking of possession of the after-acquired property, under a mortgage such as this, is held good, and to relate back to the date of the mortgage, even as against an assignee in insolvency: *Peabody v. Landon*, 61 Vt. 318, 15 Am. St. Rep. 903, 11 781, and other cases cited in the opinion of the supreme court.

"Whether and to what extent a mortgage of this kind is valid is a local question, and the decisions of the state court will be followed by this court in such case: *Dooley v. Pease*, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 308.

"The question that remains is whether the taking of possession, after condition broken, of these mortgaged chattels before, although within four months of, filing the petition in bankruptcy, was a violation of any of the provisions of the bankrupt act.

"The trustee insists that such taking possession of the after-acquired property, under the mortgage of 1891, constituted a preference under that act. He contends that the defendant did not have a valid lien against creditors, under that act; that his lien might, under other circumstances, have been consummated by the taking of possession, but, as that was done within four months of the filing of the petition in bankruptcy, the lien was not valid.

"Did this taking of possession constitute a preference within the meaning of the act?

"It was found by the referee that when the defendant took possession of the property he knew that the mortgagor was insolvent and was considering going into bankruptcy, but that he did not intend to perpetrate any actual fraud on the other creditors, or any of them, but did intend thereby to perfect his lien on the property, and make it available for the payment of his debts before other complications, by way of attachment or bankruptcy, arose. He then understood that Ryan's attachment would probably hold good against his mortgage. The question whether any conveyance, etc., was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of a federal nature: *McKenna v. Simpson*, 129 U. S. 506, 9 Sup. Ct. Rep. 365, 32 L. ed. 771; *Cramer v. Wilson*, 195 U. S. 408, 25 Sup. Ct. Rep. 95. It can scarcely be said that the enforcement of a lien by the taking possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage, is a conveyance or transfer within the bankrupt act. There is no finding that, in parting with the possession of the property, the mortgagor had any purpose of hindering, delaying, or defrauding his creditors, or any of them. Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property within the provisions of section 67e of the bankruptcy law: *Sabin v. Camp*, 98 Fed. 974.

"In the case last cited the court, upon the subject of a preference, held that though the transaction was consummated within the four months, yet it originated in October, 1897, and there was no preference under the facts of that case. 'What was done was in pursuance of the pre-existing contract, to which no objection is made. Camp furnished the money out of which the property, which is the subject of the sale to him, was created. He had good right, in equity and in law, to make provisions for the security of the money so advanced'

and the property purchased by his money is a legitimate security, and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And so when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights, under this valid and equitable arrangement, to possess himself of the property, and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law.'

"The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The supreme court of Vermont has held that such a mortgage gives an existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by an execution or attachment creditor whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months and the enforcement of one provided for in a mortgage executed years before the passage of the act by virtue of which mortgage, and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated. A trustee in bankruptcy does not, in such circumstances, oc-

py the same position as a creditor levying under an execution, or attachment, and his rights, in this exceptional case, and for the reasons just indicated, are somewhat different from what they are usually stated: *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. Rep. L. ed. 405.

is admitted on the part of the counsel for the plaintiff in error that the rule in Vermont, in cases of chattel mortgages of after-acquired property (where possession by the mortgagee is necessary to perfect his title as against attaching or execution creditors), is that, although such possession be not taken until long after the execution of the mortgage, yet the possession, when taken (if it be before the

lien of the attaching or execution creditor), brings the property under the cover and operation of the mortgage as of its date—the time when the right of possession was first acquired. It was also admitted that the supreme court of Vermont has held that when a chattel mortgage requiring possession of the mortgaged property to perfect it as to third persons was executed more than four months before the commencement of insolvency proceedings, the taking of actual possession of the mortgaged property within the four months' period brought that property under the mortgage as of its date, and so did not constitute a preference voidable by the trustee, although the other elements constituting a preference were present. Many decisions of the supreme court of Vermont are cited to this effect. It will be observed, also, that the provisions of the state insolvency law in regard to void and voidable preferences and transfers were identical with similar provisions of the bankruptcy act of 1867: *Gilbert v. Vail*, 60 Vt. 261, 14 Atl. 542.

“Under that law it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that ‘except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equities, liens, and encumbrances thereon, whether created by act or by operation of law’: *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. ed. 589. See, also, *Stewart v. Platt*, 101 U. S. 731, 25 L. ed. 816; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. ed. 1075. Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act: *In re Garcewich*, 53 C. C. A. 510, 115 Fed. 87, 89, and cases cited.

“It is true that in the case in 95 U. S. 764, 24 L. ed. 589, the savings institution had a special property in the certificates which were the subject of dispute, and had possession of them at the time of the bankruptcy proceedings, and it was held that the institution was not bound to return them, either to the bankrupt, the receiver, or the assignee in bankruptcy, prior to the time of the payment of the debt for which the certificate was held. So the state court held in this case, where the defendant took possession under the circumstances detailed, by virtue of his mortgage, and where he had the legal title to the property mortgaged, after condition broken, that the possession thus taken related back to the date of the giving of the mortgage, and in thus enforcing his lien there was not a violation of any of the provisions of the bankruptcy act.

"In *Wilson Bros. v. Nelson*, 183 U. S. 191, 22 Sup. Ct. Rep. 74, 46 L. ed. 147, it was held that the bankrupt had committed an act of bankruptcy, within the meaning of the bankrupt law, by failing, for at least five days before a sale on the execution issued upon the judgment recovered, to vacate or discharge the judgment, or to file a voluntary petition in bankruptcy. The judgment and execution were held to have been such a preference, 'suffered or permitted' by the bankrupt, as to amount to a violation of the bankrupt act. Although the judgment was entered upon the power of attorney given years before the passage of the bankrupt act, it was nevertheless regarded as 'suffering or permitting' a preference, within that act. This is not such a case. As we have said, there is no finding that the defendant had reasonable cause to believe that by the change of possession it was intended to give a preference. As the state court has said, it was rather a recognition of what was regarded as a right under the previous agreement contained in the mortgage.

"Nor does the existence of the Ryan attachment, or the chattel mortgage of March 5, 1900, executed by the bankrupt, and delivered to the defendant, and by him assigned, on the 23d of March, 1900, to the bank, create any greater right or title in the trustee than he otherwise would have. The trustee moved under section 67f [30 Stats. at Large, 565, c. 541; U. S. Comp. Stats. 1901, p. 3450], on notice to the defendant, for an order that the right or lien under the Ryan attachment should be preserved, so that the same might pass to the trustee for the benefit of the estate, as provided for in that section. This was denied. And unless such permission had been granted, the lien of the attachment was not preserved by the act, but, on the contrary, it was dissolved under section 67c.

"The mortgage assigned to the bank, and the attachment obtained by Ryan, having been dissolved by the bankrupt proceedings, the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given or attachment levied. This is the view taken by the state court of the effect of the dissolution of the mortgage and attachment liens under the bankrupt act, and we think it is the correct one. It is stated in the opinion of the state court as follows:

"It is urged that with the annulment of the attachment, the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of section 67f. There would be more force in this contention were it not for the provision by order of the court, an attachment lien may be preserved for benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for, on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property, for some reason, may otherwise pass to the trustee as a part of the estate that such preservation is necessary. We think such is the purpose of that provision.

and that unless the lien is preserved, the property, as in the case at bar, may be held upon some other lien, and not pass to the trustee: *in re Sentenne etc. Co.*, 120 Fed. 436.'

"We think the judgment of the supreme court of Vermont was right, and it is affirmed."

EQUITABLE MANUFACTURING COMPANY v. ALLEN.

[76 Vt. 22, 56 Atl. 87.]

SALES—Duplicate Memoranda—Statute of Frauds.—If a purchaser, at the time of sale, with the knowledge of the seller, adds a provision to the duplicate memorandum of sale furnished him, such provision becomes a part of the completed contract, and the whole is sufficient to satisfy the statute of frauds, although the seller fails to change his copy to correspond with that of the purchaser. (p. 916.)

ALTERATION of a Written Instrument by an Agent, who holds it temporarily for transmission to his principal, does not render it invalid. (p. 916.)

SALES—Terms of Payment—Nonacceptance.—Although the terms of payment are not specified in the invoice sent with the goods sold, this is not sufficient ground for their nonacceptance by the buyer, especially when he holds a duly executed written contract as evidence of the terms of the sale. (p. 917.)

M. M. Wilson, for the plaintiff.

J. D. Denison, for the defendant.

²³ **MUNSON, J.** At a personal interview between the plaintiff's salesman and the defendant, negotiations were had for the sale by plaintiff to defendant of an assortment of jewelry for one hundred dollars. The contract was prepared in duplicate upon order blanks furnished by the salesman, and the two papers were signed by both the salesman and the defendant, and one was retained by each. When defendant signed the copy kept by him, he wrote upon it, "Date May 1, 1901. Ship April 1, 1901." This was done in the presence of the salesman and with his knowledge. The words, "Date May 1, 1901," were never written upon the plaintiff's duplicate, but the words, "Ship April 1, 1901," were written on it at the time it was signed. The salesman afterward changed this, without the knowledge of either plaintiff or defendant, making it read, "Ship Feb. 15, 1901." The plaintiff, supposing the duplicate as received by it was the contract as executed, shipped the ²⁴ goods at the earlier date fixed by the alteration. The defendant had no knowledge of the alteration until after the goods were received and reshipped, and his action was not taken cause of the premature shipment.

The defendant claims that the minds of the parties never met, and that if they did, no contract in writing was completed. We cannot take this view of the case. The leaving of the defendant's duplicate with him, after he had made the additional entry with the salesman's knowledge, was an assent to the change made, and completed the agreement. It was then the duty of the salesman to alter his duplicate to correspond, but his failure to do so did not do away with the agreement. So there was a completed contract in the minds of the parties, identical in terms with the defendant's duplicate; and it was not necessary that both duplicates should be perfected to satisfy the statute of frauds. A written statement of the bargain agreed upon, signed by the party to be charged thereby, was taken by the vendee.

The alteration of the plaintiff's duplicate was made by the salesman after the contract was completed, and before the duplicate was forwarded. It is now well settled that the alteration of a written instrument by a stranger will not render it invalid. One who procures a writing as an agent, and holds it temporarily for transmission to his principal, is held to be a stranger, within the meaning of the rule: *Bigelow v. Stilphen*, 35 Vt. 521. The salesman was the plaintiff's agent to negotiate a contract of sale and procure and transmit the evidence of it, and there his authority ceased. The alteration was a wrongful act, for which his employer was in no way responsible. Nor has anything been done to ratify the act. The suit was not brought until after the expiration of the time²⁵ of credit as determined by the defendant's entry, and nothing is claimed at variance with the duplicate held by the defendant.

In shipping the goods, the plaintiff placed upon the box an invoice, at the top of which was a statement that all claims must be made upon receipt thereof, and on which was the word "Terms," followed by a blank not filled. The referee finds that the only reason why the defendant refused to accept the goods was because the terms of the sale were not upon the invoice. This was not a sufficient ground for nonacceptance. The defendant held a duly executed written contract as evidence of the terms of the sale.

Judgment reversed, and judgment for plaintiff.

Alteration of an Instrument by a stranger does not vitiate it: the monographic note to Burgess v. Blake, 86 Am. St. Rep. 102. As to whether an agent is a stranger within this rule, see pages 105, of this note.

JANGRAW v. PERKINS.

[76 Vt. 127, 56 Atl. 532.]

MARRIAGE BROKERAGE CONTRACTS.—A contract, by which a person, by procuring the immediate marriage of a man and woman, and the faithful performance of the marriage contract on the part of the intended husband, for a certain term of years, is to be relieved of a mortgage debt, is a marriage brokerage contract and void. (p. 918.)

MARRIAGE BROKERAGE CONTRACT—Hastening Intended Marriage.—A contract to hasten an intended marriage for a consideration is a marriage brokerage contract, and as obnoxious to public policy and law as such a contract to bring about a marriage between strangers. (p. 918.)

MARRIAGE BROKERAGE CONTRACTS.—Nothing will be assumed in Aid of a marriage brokerage contract. (p. 918.)

R. M. and E. M. Harvey, for the plaintiff.

Heaton & Thomas and T. S. Williams, for the defendant.

¹²⁸ STAFFORD, J. A bill in chancery, which is demurred to. The allegations are these: The defendant being indebted to the complainant in the sum of five hundred dollars, in consideration thereof and to secure the payment of the same, gave him a mortgage on his land with a condition that it should be void if Revett, who was about to marry the complainant's daughter should do so immediately ¹²⁹ and should for six years support her to the best of his ability and other wise perform the marriage contract. In the event of Revett's failure in any respect, and three months' notice thereof to the defendant, the latter was to pay five hundred dollars to the complainant in trust for the daughter and any children of her body then living. Revett married the daughter, but in all other respects the condition has been broken. Prayer that the defendant pay the five hundred dollars or be foreclosed. In the court of chancery there was a pro forma decree adjudging the bill sufficient. The defendant appealed, and insists that there is no equity in the bill because the mortgage is against public policy and void, in that it placed the defendant under the obligation, or at least the financial inducement, to bring about or hasten a marriage between Revett and the complainant's daughter. Neither the mortgage nor the bill discloses any reason why Revett should have married the person proposed, nor any reason why the defendant should have concerned himself in the marital relations of either.

By the contract, what the complainant said to the defendant was in effect this: "You owe me five hundred dollars; give me a deed of your land to secure the debt and if Revett shall marry my daughter at once, and be for six years her faithful husband, the debt shall be satisfied, otherwise you shall pay me the five hundred dollars to be held in trust for her."

On the other part, what the defendant said to the complainant was this: "I owe you five hundred dollars, and I deed you this land to secure the debt; but if Revett shall marry my daughter at once and be for six years her faithful husband, the debt shall be satisfied, otherwise I must pay ~~130~~ you the five hundred dollars to be held by you in trust for her."

This was a marriage brokerage contract, under which the defendant by procuring the immediate marriage of Revett and the complainant's daughter and the faithful performance of the marriage contract on Revett's part for six years, could be relieved of a mortgage debt of five hundred dollars. As such it is void: *Hall & Keen v. Potter*, 3 Lev. 412; *Stribbleshaw v. Brett*, 2 Vern. Ch. 445; *Duval v. Wellman*, 124 N. Y. 114, 26 N. E. 343; *Johnson v. Hunt*, 81 Ky. 321; *White v. Equitable Nuptial Ben. Union*, 76 Ala. 251, 52 Am. Rep. 325; 15 Am. & Eng. Ency. of Law, 954.

That Revett was about to marry the daughter makes no difference for a contract to hasten an intended marriage is as obnoxious to the objection as a contract to bring about a marriage between strangers: *Morrison v. Rogers*, 115 Cal. 252, 36 Am. St. Rep. 95, 46 Pac. 1072.

If the contract does not mean that the debt itself is to be extinguished in case Revett marries and fulfills his marriage contract, but only that the mortgage shall be extinguished leaving the debt in force, then there was no consideration for the mortgage. The privilege of getting the mortgage alone released would be no inducement to the giving of the mortgage. There is no allegation that the daughter married Revett relying upon the defendant's contract.

The complainant's argument is that if the contract could be supported upon any supposable state of facts we should assume such facts to exist; and suggests that probably the daughter was with child by Revett. But we cannot assume that, nor any other fact not appearing. The contract being on its face and the facts alleged open to the objection urged, it was the duty of the complainant to bring upon the record, ¹³¹ in traversable form, any claimed facts which might relieve it of the objection.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

THOMPSON v. FAIRBANKS.

[75 Vt. 361, 56 Atl. 11.]

BANKRUPTCY—Attachments—Vacation—Liens.—If property of a bankrupt subject to a chattel mortgage is attached within four months of the filing of the petition in bankruptcy, and the attachment is vacated by the debtor's discharge without any order of court preserving the attachment lien for the benefit of the estate of the debtor as provided for by the national bankruptcy act, the property, unless exempt, did not pass to the trustee in bankruptcy, but is properly held under the prior chattel mortgage lien. (pp. 902, 903.)

CHATEL MORTGAGES—Description of Property.—If a chattel mortgage describes the property as the mortgagor's livery property, together with after-acquired property, consisting of all horses and other livery property that the mortgagor may purchase in his business or acquire by exchange, the mortgage is a valid conveyance of such after-acquired property, after the mortgagee has taken possession with the consent of the mortgagor, as to the latter's creditors. (p. 904.)

BANKRUPTCY—Chattel Mortgages—Fraudulent Transfers.—If property covered by a chattel mortgage is delivered to the mortgagee by the mortgagor while the latter is insolvent, the transfer is not invalid under the national bankruptcy act, providing that transfers by a bankrupt with intent to hinder, delay and defraud his creditors shall be void, except as to purchasers in good faith for a fair consideration, unless it is clearly shown that such insolvent, in thus transferring the mortgaged property to the mortgagee, intended to hinder, delay or defraud any of his creditors. (p. 905.)

BANKRUPTCY—Chattel Mortgages—Preferences.—If a chattel mortgagee takes possession of property under a mortgage executed more than seven years prior to the enactment of the national bankruptcy act, and within four months prior to the mortgagor being adjudged a bankrupt, such transfer does not constitute a preference to a creditor within the meaning of such bankruptcy act, unless it clearly appears that the mortgagee or his agent had reasonable cause to believe that the transfer was intended to give him a preference. (p. 905.)

by being the occasion of many unhappy marriages, the loss of moral influence of parents over the happiness, due nurture, and education of children, the temptation to the exercise of an undue influence by false seductive hopes held out to parties induced by the self-interest of the brokerage agents. All such contracts are void, not because they are fraudulent upon either party, but because they are a fraud upon third persons, and because they are a public mischief in their tendency to cause matrimony to be contracted on mistaken principles: *Crawford v. Russell*, 62 Barb. 92. "Although there may not be a fraud on either party, such contracts are held to be void and a public mischief, forasmuch as they are calculated to bring to pass mistaken and unhappy marriages to countervail parental influence in the training and education of children, and to tempt the undue and pernicious influence for selfish gain in respect to the most sacred of human relations. An essential element in such contract is the procurement of a marriage, oftentimes without regard to the wishes of friends or parents, or to the happiness of the parties most deeply interested": *White v. Equitable Nuptial Benefit Union*, 76 Ala. 251, 52 Am. Rep. 325, 326.

"A man might entertain a very sincere opinion that a marriage between a certain gentleman of his acquaintance and a lady of considerable fortune would be highly beneficial, and contribute to the happiness of both parties, and he might lawfully propose this to one or both. But any promise of reward made to him to induce him to do this, or any promise made afterward, in consideration of such service, would be void": Mr. Chief Justice Shaw in *Fuller v. Dame*, 18 Pick. 481.

The interference by one, upon agreement that he is to receive a reward or other consideration or compensation if he bring about a marriage, is simply void. Thus, a contract made by an aged man with his grandson that if the latter will aid the former in inducing a young lady to marry him he will deliver to the grandson a note which he holds against him for a certain sum, is against the policy of the law and void: *Johnson v. Hunt*, 81 Ky. 321. And a contract to pay a certain sum of money to a person on his marriage with a certain woman on condition that he shall give the promisor the exclusive right to carry marriage benefit insurance on such man and woman, is void: *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151. A contract between a man and a woman by which he is to give her a certain sum in consideration that she will marry him and they are to be married as soon as a divorce shall be procured by his then wife, proceedings then pending, is also void: *Leupert v. Shields*, 14 Mo. App. 404-406, 60 Pac. 193.

In an action of debt upon a bond it may be pleaded that such bond was given upon consideration of plaintiff's using his influence to procure a certain marriage for the defendant, and if the issue upon plea be found for the latter, it will avoid the bond: *Overman v. Overman*, 9 Nev. & B. 185.

An undertaking to procure a person to keep a promise of marriage already made, if made for a consideration, is as much within the rule prohibiting marriage brokerage contracts as a contract of marriage brokerage entered into in advance of such promise to marry: *Morrison v. Rogers*, 115 Cal. 252, 56 Am. St. Rep. 95, 46 Pac. 1072.

The only case found anywhere, which seems to conflict with the above doctrine is that of *Wall v. Scales*, 1 Dev. Eq. 472, in which it was held that an agreement made by a father, in consideration of the marriage of his illegitimate daughter, to settle all of his estate upon her husband, herself, and the issue of the marriage is valid and binding.

III. Enforcement of Contract.

"The rule that a marriage brokerage contract is invalid as being contrary to public policy, and that the services rendered under such contract are without legal consideration, and are incapable of forming the foundation of an action for their recovery, is so elementary that but very few cases involving the question have found their way into the reported decisions, but whenever the question has been presented, courts have invariably declared that the action could not be maintained": *Morrison v. Rogers*, 115 Cal. 252, 56 Am. St. Rep. 95, 46 Pac. 1072. The pernicious tendency of contracts for procuring a marriage is so great that enforcement of them by the courts, either at law or in equity, will be refused regardless of the propriety or expediency of the particular marriage: *Hellen v. Anderson*, 83 Ill. App. 506. A contract to pay for services in the nature of brokerage in negotiating a marriage is void and will not be enforced, either for the influence or services directly involved, or for expenditures or services incidental or collateral to the main purpose: *Crawford v. Russell*, 62 Barb. 92. A promise, by one desirous of marrying a certain woman, to pay a person if he would give the woman such information concerning the promisor as would tend to induce her to marry him, is void and cannot be enforced: *In re Grobe's Estate* (Iowa), 102 N. W. 804. "It is well settled that no recovery can be had under a contract for services to be rendered in promoting or bringing about a marriage. Advice and solicitation on the part of a third person with reference to entering into the important relation of marriage are presumed to be given from considerations affecting the interests of the parties themselves, and not for pecuniary reward. It is contrary to public policy to make such advice or solicitation the basis of an agreement to pay money, and the rule is equally applicable to advice or solicitation with reference to carrying out a marriage contract, as it is with reference to the formation of such a contract": *In re Grobe's Estate* (Iowa), 102 N. W. 804, 805.

IV. Recovery of Consideration Paid.

Although the authorities are in direct conflict, the better rule would seem to be that contracts by one party to procure, for a consideration, a husband or wife for another, must be considered fraudulent in

their character, and the party paying the consideration must be regarded as under a species of imposition or undue influence, and that as the business of promoting marriages is against the policy of the law and public interest, the courts will aid a person who has patronized such a business by relieving him or her from all contracts made and will grant restitution of any money paid or property transferred: *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343. Hence where a woman, in pursuance of a previous agreement made with a marriage broker employed by her, after her marriage procures money and had from her husband, who is ignorant of the agreement, and pays the broker his stipulated fee by turning over the money and giving a mortgage on the land to him, the husband may maintain a suit to recover back such money from the broker and to cancel and annul the mortgage: *Place v. Conklin*, 23 Misc. Rep. 40, 51 N. Y. Supp. 407; affirmed, *Place v. Conklin*, 34 N. Y. App. Div. 191, 54 N. Y. Supp. 532. This last case goes further than its predecessor: *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343, in which it was simply held that a contract by which a woman employed a man as a marriage broker to procure a husband for her was void, and that the woman was entitled to recover from the marriage broker the sum which she had paid him for his efforts in her behalf.

Decisions to the contrary, however, exist. Thus it has been held that a marriage brokerage contract is void as against public policy, and that both parties being in *pari delicto*, the person employing the broker cannot recover the money paid under such a contract: *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586. And such was the decision of the court of common pleas of New York as appears by *Duval v. Wellman*, 14 Daly, 515, but, as we have before seen, the case was reversed on appeal: *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343.

KING v. COCHRAN.

[76 Vt. 141, 56 Atl. 667.]

CORPORATIONS, FOREIGN—Enforcing Stockholder's Liability—Sufficiency of Declaration.—In a suit by a receiver for a foreign corporation against a resident stockholder to recover on his statutory liability, an allegation in the declaration that plaintiff, under the authority of the state of his appointment, as such receiver, acquired the title to all of the assets of the corporation and a right to enforce the stockholder's liability, is a sufficient allegation of title in plaintiff. (p. 923.)

FOREIGN CORPORATIONS—Foreign Receiver—Title to Assets.—Complaint alleging the liability of a resident stockholder in a foreign corporation under a foreign statute, setting forth the statute, and alleging that under it as interpreted by the courts of that state the liability of the defendant as a stockholder is a contractual

Liability and arises upon the contract of subscription to the capital stock, made by defendant in becoming a stockholder, and that in subscribing to said stock and becoming a stockholder, he thereby guaranteed payment to the creditors of an amount equal to the par value of the stock held and owned by him, which should be payable to the receiver of the corporation, and that such receiver is the only person who can enforce said liability," sufficiently shows that the stockholder's liability is a secondary asset of the corporation available for the payment of its debts. (p. 925.)

CORPORATIONS, FOREIGN—Foreign Proceedings—Effect on Resident Stockholder.—A resident stockholder in a foreign corporation, without notice, is bound by proceedings in the state of its domicile, assessing the stockholder's liability, and such liability may be enforced against him in the state of the stockholder's residence. (p. 926.)

T. J. Deavit and E. H. Deavit, for the plaintiff.

Dunnett & Slack, for the defendant.

¹⁴⁵ MUNSON, J. The original declaration in this case was examined in *King v. Cochran*, 72 Vt. 107, 47 Atl. 394, and was adjudged insufficient upon the authority of *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752. It was held in the case cited that in this state a receiver has no remedy at law other than ¹⁴⁶ those given him by the common law; that he cannot sue at law in his own name without having the legal title to the thing in controversy; that he does not acquire by virtue of his appointment the title to the property received; and that the declaration in question did not show that the plaintiff had such a title as would enable him to maintain an action at law in his own name.

The case is now before us upon an amended declaration demurred to generally. No question is made as to the form of action. The sufficiency of the count, as against any objections that are urged against it, depends upon whether it alleges a legal title to the cause of action declared upon, and whether that cause of action is one enforceable at law.

The count alleges that under the statute of Washington, as interpreted by the supreme court of that state, the receiver, by virtue of his appointment, "acquired the legal title to all of the assets of said corporation including choses in action and more particularly the right to enforce the liability of stockholders of said corporation and especially the liability of the defendant as a stockholder to the creditors of said corporation arising from his contract of subscription to the capital stock made by the defendant in becoming a stockholder." The defendant contends that this is merely an allegation of a right to enforce the liability, and not of a title to the liability.

But we think the sentence quoted, properly construed, is an allegation of title. Its fair meaning is that the receiver acquired the legal title to all the assets of the corporation including choses in action, and of these choses in action more particularly the right to enforce the liability of stockholders, and of these liabilities more particularly that of the defendant.

¹⁴⁷ It is said, however, that this is not an asset of the corporation, but a liability to the creditors of the corporation, and therefore not within the allegation. But the court sets up the statute of Washington, and alleges that under that statute, as interpreted by the supreme court of the state, "the liability of the defendant as a stockholder is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder, and that in subscribing to said stock and becoming a stockholder he thereby guaranteed payment to the creditors of an amount equal to the par value of the stock held and owned by him, which should be payable to the receiver of said corporation," and further alleges that under that statute as so interpreted, "such receiver is the only person who can enforce said liability." It sufficiently appears from this that the liability of the stockholders is a secondary asset of the corporation available for the payment of its debts.

The nature of this liability was considered in *Barton National Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176, where it was said: "Such a provision is entirely for the benefit of creditors, and is in effect a requirement that the stockholders, by availing themselves of the advantages to be derived from such an organization, shall impliedly agree to be responsible for the debts of the corporation to the extent by law provided. . . . This provision, with the capital of the corporation, was the basis of its credit. The creditors contracted with reference to it. It became a part of the law of their contracts, and constituted security for any debt contracted by the company. . . . The creditors had a right to understand that, although the debts contracted were the debts of the corporation and that, in their enforcement, the remedy against it and its primary assets must first be exhausted, if such assets proved insufficient, they had, as security for deficiency, this liability of the stockholders. The stockholders knew the law and voluntarily assumed that responsibility, and while it was not enforceable by the corporation, it is a secondary asset for that purpose, and constitutes a trust fund resorted to by the receiver in the marshaling of assets, if

cessary for the full satisfaction of the indebtedness for which is holden."

The manner of enforcing this obligation was considered in *Cowarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 51, and the court saw nothing in the nature of the liability to prevent a holding that the legal title was in the receiver. The opinion says: "The receiver is called by the Washington court quasi assignee for creditors. He is charged with the administration of a trust fund which does not take form or come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors he is the owner of the legal title to this fund as a trustee for the creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now, or who ever could, legally demand and collect the money. We are of the opinion that the action is rightly brought in his name."

It is clear that the liability is not to the creditors in any sense which prevents its being an asset of the corporation and therefore a chose in action of which the receiver has the legal title. The statement that the stockholder guaranteed payment to the creditors and the recital of this guaranty as a liability to the creditors must be construed in connection with the various allegations which disclose the nature of the liability, and especially in connection with the allegations that the amount was to be payable to the receiver, that the title ¹⁴⁹ is in him, and that a recovery can be had by no one else. When the allegations are read together there is no room for doubt as to the meaning of the words in question.

But it is said that if the receiver has the legal title, he has no case upon which a suit at law can be maintained. It is argued that the defendant is not bound by the proceedings in which the individual liability of the stockholders was determined in the state of Washington because not a party to those proceedings, and that he can be made liable here only in a court where an accounting of the assets and indebtedness of the bank can be had. This calls for an inquiry as to the effect to be given to the account taken and assessment made by the Washington court having jurisdiction of that matter. If these proceedings are an adjudication conclusive upon the defendant the amount of his liability is ascertained, and a suit at law is the appropriate remedy.

In *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739, 33 L. ed. 184, an assessment ordered by a court which had jurisdiction of the corporation was held binding upon stockholders residing in another state, although not made parties as individuals. It is said in the opinion that a stockholder is so far an integral part of the corporation that in the view of the law he is privy to the proceedings touching the body of which he is a member; that a decree against the corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, and that this is involved in the contract created in becoming a stockholder. It is true that the assessment sued upon in the case cited was on a subscription for stock, but we see no ground upon which the two liabilities can be distinguished as regards the question under consideration; and other courts have held the same: ¹⁵⁰ *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725.

The ground upon which foreign stockholders are held concluded by the proceedings taken to ascertain the deficiency for which they are holden upon their secondary liability is fully and clearly stated in *Howarth v. Lombard*. The liability is contractual as well as statutory. The law provides that each stockholder shall be liable equally and ratably for the obligations of the corporation to an amount equal to the amount of his stock in addition to the stock itself, and that if the corporation becomes insolvent and a receiver is appointed he shall pay to the receiver the amount of such liability when the same shall be ascertained and decreed by the court having jurisdiction of the case. The stockholder contracts with reference to these requirements when he takes his stock, and is as much bound by them as if they were incorporated in a written agreement bearing his signature. His agreement covers not only the liability, but the manner in which the extent of the liability shall be determined; and when required to contribute in accordance with his undertaking he cannot be permitted to question the conclusiveness of the proceeding.

The defendant, as a stockholder of the Washington Savings Bank, is bound by all valid proceedings had in pursuance of the statute which controls the settlement of its affairs. In becoming a member of the corporation he submitted himself to the laws of Washington in matters touching his relations to

the bank and its creditors. As represented by the corporation, he had notice of and was present at the hearing when the account was taken and the assessment made. If the suit were in equity, he could not cast that proceeding aside and demand a fresh accounting. He could impeach the record only for fraud, and that he can do in a court of law.

¹⁶¹ Judgment reversed, demurrer overruled, declaration adjudged sufficient, and cause remanded.

A Stockholder's Liability to the creditors of the corporation is contractual, though it is separate and collateral to the liability of the corporation: *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229, and see the cases cited in the cross-reference note thereto. On the enforcement of this liability in a foreign state, see *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, and cases cited in the cross-reference note thereto; monographic note to *Fowler v. Lamson*, 37 Am. St. Rep. 168-175.

As to Whether a Receiver may bring an action to enforce the statutory liability of a stockholder, see *McLaughlin v. Kimball*, 20 Utah, 254, 77 Am. St. Rep. 908, and cases cited in the cross-reference note thereto; *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565. According to *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835, after a corporation has become insolvent and a receiver has been appointed, the liability of the stockholders, contractual and not as yet sued upon, constitutes an asset for the corporate debts, and he alone can sue on such liability. This doctrine is applied in that case to a corporation created in a sister state: See, too, *Murty v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779.

LAWRIE v. SILSBY.

[76 Vt. 240, 56 Atl. 1106.]

PRESCRIPTION.—Presumption of a Grant from long-continued enjoyment arises only where the person against whom the right is claimed could have lawfully interrupted or prevented the exercise of the subject of the supposed grant. (p. 928.)

WATERS—Prescriptive Rights—Riparian Owners.—A person who, for more than forty years, under a claim of right, has taken water by means of a pipe from a brook on a riparian lot to his non-riparian farm, has not thereby acquired any right as against an upper riparian owner, who could not lawfully have interrupted such taking of the water. (pp. 928, 929.)

WATERS—Prescriptive Rights—Riparian Owners.—A person who, for more than forty years, has, under a claim of right, taken water by means of a pipe from a brook on a riparian lot to his non-riparian farm, thereby acquires a prescriptive right to thus take the water as against the riparian owner, although the water thus taken in the first instance under a license from such owner is unlimited in point of time. (p. 930.)

WATERS—Pollution—Riparian Rights.—A nonriparian grantee of a riparian proprietor, of a right to take water from a stream for nonriparian purposes, may maintain an action in his own name against an upper riparian proprietor for polluting the water of the stream to his damage. (p. 932.)

WATERS.—Right to Take Water from a spring or a stream is an interest in the land itself, which is grantable as a right in gross or appurtenant, and is assignable, descendable and devisable. (p. 933.)

WATERS—Riparian Rights—Reasonable Use.—Each riparian owner has a right to the reasonable use of the water of the stream for his own natural wants, and for the like wants of his family and his beasts. (p. 933.)

WATERS—Riparian Rights—Reasonable Use.—It is a question of fact whether the use of the water of the stream made by a riparian owner for his own use, or for sale to others for nonriparian purposes, is, under all of the circumstances, a reasonable use. (p. 933.)

Smith & Smith, for the plaintiffs.

Dunnett & Slack and R. M. Harvey, for the defendants.

245 ROWELL, C. J. The orators who take water by a pipe from a brook on what is called the Lawrie lot, and conduct it to their several nonriparian farms and buildings for domestic and farm uses, have not thereby acquired a prescriptive right to do so as against the defendants, who own the riparian land next above the Lawrie lot, called the Hale lot, though the water has been taken long enough in point of time, for the law of this state is, as well as of many if not most of the other states, and of England, that the presumption of a grant from long-continued enjoyment arises only where the person against whom the right is claimed could have lawfully interrupted or prevented the exercise of the subject of the supposed grant: *Shumway v. Simons*, 1 Vt. 53; *Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220; *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313; *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. Eq. 335; *Vliet v. Sherwood*, 35 Wis. 229; *Nelson v. Butterfield*, 21 Me. 220; 28 Am. & Eng. Ency. of Law, 1st ed., 1005; *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300, 325; *Chasemore v. Richards*, 7 H. L. Cas. 349, 370; *Webb v. Bird*, 13 Com. B., N. S., 841; *Sturges v. Bridgman*, 11 Ch. Div. 855.

246 Here, neither the defendants nor their predecessors in title could lawfully have interrupted nor prevented the taking of the water, as it does not appear that it infringed their rights.

Murchie v. Gates, 78 Me. 300, 4 Atl. 698, and *Holker v. Orritt*, L. R. 8 Ex. 107, and L. R. 10 Ex. 59, on which the

orators rely to support their claim of a prescriptive right, are not in point, for there natural streams had been divided so that part of the water flowed in artificial channels, and the law of natural watercourses was applied to the artificial channels, and the plaintiffs were regarded as riparian proprietors the same as though they abutted on the natural branch of the stream; though in the exchequer chamber the judgment in *Holker v. Porritt* was affirmed on different ground.

The orators, therefore, having no prescriptive right against the defendants, must stand on whatever other rights they have against them. The orator, James B. Lawrie, owns the Lawrie lot, and has ever since 1870, and must stand on his right as such owner. The defendants do not question the right of the other orators as against Lawrie to take the water as they do, but they say nothing as to the legal quality of the right, and the orators claim that in the circumstances it will be presumed to rest in grant, and we are inclined to think that this is the true view of the matter. It appears from the report that prior to the year 1854, the then owners of the orators' farms and buildings, one of whom was H. N. Chamberlin, the then owner of the Lawrie lot and of the said Lawrie's farm, joined together in laying the aqueduct in question, and thereby took water from the brook to their respective farms and buildings for domestic and farm uses, and shared in the expense and ownership of said aqueduct; that said farms and buildings were thus supplied with water until the year 1854, when the owners of said aqueduct, wishing to ²⁴⁷ have their rights therein better defined and understood, and better enforceable among themselves, their heirs and assigns, adopted written articles, purporting to be under chapter 85 of the Compiled Statutes, whereby they undertook to form themselves into a corporation under the name of the Ox Bow Aqueduct Company, for the purpose of bringing water by aqueduct from the hill westerly of the "Ox Bow" where most convenient, each agreeing to pay his proportion of the expense, and the cost of keeping in repair to the point where each took the water from the main branch, each putting in and maintaining his own branch, and whereby the number of shares that each, or his assigns, should be entitled to, was fixed, and subjected to assessment from time to time for building and repairing the aqueduct. And water has ever since been, and still is, taken from said brook by means of said aqueduct, to the farms and buildings of the orators for the purposes and uses aforesaid.

Although it appears clearly enough that water was thus taken in the first instance by license of Chamberlin, the then owner of the Lawrie lot, yet it appears with equal clearness that that license was unlimited in point of time, and so understood by all the parties thereto, and that the water has been taken and used for all these forty years and more under a claim of right. This being so, the fact that the use began by permission did not prevent the acquisition of a prescriptive right to take as against the owners of the Lawrie lot: *Arbuckle v. Ward*, 29 Vt. 43; *Blaine v. Ray*, 61 Vt. 566, 18 Ail. 189.

But is this prescriptive right sufficient to enable the orators, other than Lawrie, to maintain this bill in their own names? It is not, unless a grant to them from an owner of the Lawrie lot would be sufficient, for they can prescribe for ²⁴⁸ no more than he could grant, as prescription is based upon a supposed grant. This raises the question whether a nonriparian grantee of a riparian proprietor, of a right to take water from the stream for nonriparian use, can maintain an action in his own name against an upper riparian proprietor for polluting the water of the stream to his damage. It has been expressly held in England that he cannot; that though the grant is good against the grantor, it does not enable the grantee to sue in his own name a riparian proprietor other than his grantor for interfering with his right. This is put upon the ground that the rights of a riparian proprietor in respect to the water are derived entirely from his possession of land abutting on the stream, and are so annexed to the soil that they cannot be granted away apart from the land as far as other riparian proprietors are concerned: *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300; *Ormerod v. Todmorton Mill Co.*, L. R. 11 Q. B. 155; *Kensit v. Great Eastern Ry. Co.*, 27 Ch. D. 122. In *Nuttall v. Bracewell*, L. R. 2 Ex. 1, it was held that the plaintiff was a riparian proprietor in respect of a goit; but *Pollock, C. B.*, and *Channell, B.*, adhered to the ground of their judgment in the *Stockport Waterworks* case, and said that if a riparian proprietor is bound to abstain from interfering with nonriparian grantees of riparian proprietors, as well as from interfering with riparian proprietors themselves, it would well destroy his rights altogether, for that can hardly be said a right that is subject to an indefinite restriction, unassigned and practically unascertainable. They considered that the rights of a riparian proprietor with respect to the stream

are limited only by the rights of persons in a similar or an analogous position with themselves. The master of the rolls said in *Ormerod v. Todmorden Mill Co.*, that though the law of flowing ²⁴⁹ water is a part of the common law of England, it exists only as among riparian proprietors, and does not extend to those whose lands do not abut on streams and rivers.

But in this country it is held in some jurisdictions that an incorporeal right to water may be granted in gross or made appurtenant to other land, and that the grantee may sue in his own name for a disturbance of his right. Thus, in *St. Anthony Falls Water Power Co. v. City of Minneapolis*, 41 Minn. 270, 43 N. W. 56, a riparian owner of part of an island in the Mississippi river just above the falls, sold other land of his not bordering on the river, and with it granted a right to take water from the river for use thereon, which the grantees did by means of a canal, and the defendant succeeded to their rights. It was objected that as the city had no land abutting on the river, it was not a riparian owner, and had no riparian rights. But the court said it was entirely immaterial whether the defendant's rights were riparian or conventional; that it had rights, for the disturbance of which it had a right of action; that it was unimportant whether it was held that the provision in the grantor's deed in regard to a canal amounted to a division of the river into two courses, or whether, what seemed to be more in accordance with principle and common sense, it was held that a riparian owner may grant a part of his estate not abutting on the stream, and, as appurtenant thereto, a right to draw water from the stream for use on such land.

In *Goodrich v. Burbank*, 12 Allen, 459, 90 Am. Dec. 161, it was held that an assignable right in gross to take water from a spring on land conveyed could be reserved to the grantor, his heirs and assigns. The court said that water itself may not be the subject of property, but that the right to take it, and to have pipes laid in the soil of another for that purpose, and to ²⁵⁰ enter upon the land of another to lay, repair and renew such pipes, is an interest in the realty, assignable, discernable and devisable; that there are many cases in Massachusetts recognizing the right to take water from a millpond as a distinct and substantive right, without restriction as to its use at any particular place; and that it was unable to distinguish between a right to take water from a pond by means of a canal for the purposes of power, and a right to take water from a spring for domestic purposes. Judge Curtis said in *Lonsdale Co.*

Moies, 21 Monthly Law Rep. 658; Brunner's Col. Cas. 655, Fed. Cas. No. 8496, a case in the United States circuit court concerning water rights in the Blackstone river, that incorporeal rights may be inseparably annexed to a particular messuage or tract of land by the grant that creates them, or may be granted in gross, and afterward, for the purpose of enjoyment, be annexed to a messuage or land, and then severed therefrom by a conveyance of the messuage or land without the right, or a conveyance of the right without the land. This court said substantially the same thing in *Rood v. Johnson*, 26 Vt. 64, 71, when construing a grant of a water right in a river, thus: "The land is conveyed, and the grantor might, had he chosen, have reserved the use of all the water to himself, or he might have conveyed the use of all or a part of it as a mere incorporeal hereditament, and retained the fee of the land in himself, notwithstanding the maxim that one cannot convey the water separate from the land."

In *Poull v. Mockley*, 33 Wis. 482, a grant to one and his heirs and assigns forever of a right to take water from a well on the grantor's land, was held to create an easement in gross, and to be assignable by the grantee. The court followed the Massachusetts cases, and said it saw no substantial reason why such an easement is not assignable.

²⁵¹ In *Hill v. Shorey*, 42 Vt. 614, it was held that a reservation in a deed, "of the right of taking all the waste water as it now runs into the tub on said premises by aqueduct" from a spring thereon, was a reservation of an interest and a right in the spring itself to the extent named. It is said in *Washburn on Easements*, fourth edition, 14 and 15, that where water is, as it may be, the subject of sale in gross as a thing of value, it does not seem to be violating any rule of law to regard it as a species of profit a prendre, and therefore a subject of separate grant; and that although it might be difficult to raise a prescriptive right of inheritance in the privilege of an aqueduct by personal enjoyment independent of its use in connection with some estate, and although a right to the enjoyment of water from a well or a spring or a river may be gained by custom, since no
* of the soil or freehold proper is thus carried away any
* than it is ordinarily supplied from natural sources, yet,
* all, it is an interest in land; and that, as said in *Goodrich*
ank, 12 Allen, 459, 90 Am. Dec. 161, above cited, there
is distinction between a right to take water by a canal
and for the purposes of power, and the right to take
spring in a pipe for domestic purposes.

It would seem to follow that if the right to take water from a spring or a stream is an interest in the land itself, that such right is grantable as a right in gross or appurtenant, and is assignable, descendable, and devisable; and such, we think, has always been the view entertained and practiced upon in this state. Situated as we are, with so many springs and streams of pure water on which our people are largely dependent for their domestic needs, we think this doctrine best adapted to our local situation and circumstances. We hold, therefore, that the other orators, as well as Lawrie, can maintain the bill in their own names if the defendants have ²⁵² infringed their rights. But what are their rights as against the defendants?

Each riparian proprietor has a right to use the water of the stream for his own natural wants, and for the like wants of his family and his beasts. Many of the authorities say that for these purposes he may use all of it if necessary. But the logical result from the correlative rights of riparian proprietors would seem to be that each must use his own right so as not to deprive the others of an equal enjoyment of their same rights. And this is the view taken in *Chatfield v. Wilson*, 31 Vt. 358, and *Barre Water Co. v. Carnes*, 65 Vt. 626, 36 Am. St. Rep. 891, 27 Atl. 609, 21 L. R. A. 769. The same view is taken in *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191, 57 Am. Dec. 85. It would seem to follow that reasonable use is the only limit that can be set to the exercise of these rights. This is the rule in New Hampshire, where they repudiate the English doctrine, and hold it to be a question of fact whether the use of the water made by a riparian owner for his own purposes or for sale to others for nonriparian purposes is, in all the circumstances, a reasonable use: *Gillis v. Chase*, 67 N. H. 161, 68 Am. St. Rep. 645, 31 Atl. 18. Sometimes the law will say what is a reasonable use. Thus, they hold in New Jersey that the sale of a right to take water for use on nonriparian lands is unreasonable as matter of law, if thereby another riparian proprietor sustains palpable damage: *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538. But if the use is lawful and beneficial; it must be deemed to be reasonable, and not an infringement of the rights of other riparian owners to whom it occasions no actual and perceptible damage: *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191, 197, 57 Am. Dec. 85. There a riparian owner granted to the defendant a perpetual right to divert all the water of the stream to its nonriparian premises, wh it supplied its locomotive engines with water. ²⁵³ The c

BAILEY v. BAILEY.

[76 Vt. 284, 56 Atl. 1014.]

DIVORCE—Alimony—Pension Money.—The court, upon granting a divorce for the fault of the husband, may, in fixing the amount of permanent alimony he shall be required to pay, consider his pension money as part of his financial resources. (p. 936.)

H. B. Howe and M. Montgomery, for the defendant.

May & Simonds, for the plaintiff.

²⁶⁵ WATSON, J. On dissolution of the marriage for the cause of intolerable severity, the court decreed to the petitioner as permanent alimony the sum of four hundred dollars payable, one hundred dollars on the twentieth days of October, 1903, January, April, and July, 1904, respectively, with interest after maturity, if not paid, and made the same a charge upon the petitionee's interest in certain real estate. The petitioner was also decreed all the articles of personal property and the household furniture then in her possession. It was further decreed that the petitionee should pay to the clerk of the court, for the benefit of the petitioner, the sum of thirty-six dollars on the fifteenth day of October, fifteenth day of January, fifteenth day of April, and the fifteen day of July annually thereafter, until further order of court, as a continuing alimony. In the making of this last order the court took into consideration the pension of twenty-four dollars per month which the petitionee receives from the United States government for disabilities resulting from his service as a soldier in the Civil War, holding as a matter of law that the court might properly consider that as a part of his financial resources. To this holding the petitionee excepted. Beyond this no exception was taken, and our consideration of the case is confined accordingly.

The Revised Statutes of the United States, section 4747, provides that "no sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or any agent or officer thereof, or is in the course of transmission to the pensioner ²⁶⁶ entitled thereto, but shall inure wholly to the benefit of such pensioner."

It is contended that by force of this section the court has no power to award pension money not received by the husband

[illegible]

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

at the date of the decree, as alimony to a divorced wife. But this is not the question. The question is, Had the court a right, as a matter of law, to consider such a pension as a part of the petitionee's financial resources?

The exemption under the law covers pension money only during its transmission to the pensioner. When it has been received by him, it has inured wholly to his benefit, within the meaning of this statute. Then, to the same extent as money from other sources, it is subject to attachment, levy and seizure as opportunity presents itself: *McIntosh v. Aubrey*, 185 U. S. 122, 22 Sup. Ct. Rep. 561, 46 L. ed. 834. And so, in effect, was the holding of this court in *Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. 649. Nor did the fact that it was neither property in hand nor the income of such property render its consideration improper. A husband's faculties are his capabilities of maintaining a family, ordinarily consisting of his income from whatever source derived, and they, with all the other circumstances surrounding the parties, should be taken into consideration when alimony or other annual allowance is decreed to be paid by the husband to the wife: 2 Bishop on Marriage and Divorce, secs. 1005, 1006, 1017. See, also, *Hedrick v. Hedrick*, 128 Ind. 522, 26 N. E. 768; *Tully v. Tully*, 159 Mass. 91, 34 N. E. 79; *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Holmes v. Holmes*, 29 N. J. Eq. 9.

Judgment affirmed.

Tyler, J., dissents.

That the Amount of Alimony allowed a wife should be governed in a measure by the husband's circumstances and capabilities, see *Ex parte Spencer*, 83 Cal. 460, 17 Am. St. Rep. 266; *Cole v. Cole*, 142 Ill. 19, 34 Am. St. Rep. 56. Consult, also, *Webb v. Webb*, 140 Ala. 262, 103 Am. St. Rep. 30; *Cairnes v. Cairnes*, 29 Colo. 260, 93 Am. St. Rep. 55.

The Exemption of Pension Money from legal process is discussed in the monographic notes to *Rozelle v. Rhodes*, 2 Am. St. Rep. 596-598; *Cullen v. Harris*, 66 Am. St. Rep. 386, 387; and the subsequent case of *Falkenburg v. Johnson*, 102 Ky. 543, 80 Am. St. Rep. 369.

KIMBALL v. COSTA.

[76 Vt. 289, 56 Atl. 1009.]

BILLS AND NOTES.—Marginal Figures in a note may be referred to for the purpose of supplying the amount for which the note was given, when such amount has been wholly omitted in the body of the note. (p. 940.)

SALES, Conditional—Additional Security.—In trover for the conversion of property described in a lien note, it is not material that a third person has given the holder of the note a chattel mortgage upon other property, in which it is stated that he has purchased the property described in the note, that the mortgage is given as additional security for the payment thereof and in consideration of the holder's forbearance to take possession of and foreclose on the property described in such note. (p. 940.)

Smith & Smith, for the plaintiff.

H. A. Farnham and May & Simonds, for the defendant.

²⁸² **TYLER, J.** This action is trover for the conversion of two horses. The defendant admitted the conversion, provided the plaintiff had a legal title to the property.

It appeared that the plaintiff had made a conditional sale of the horses to one Lawrence, and in proof of a lien reserved he introduced in evidence, subject to the defendant's exception, a memorandum of the sale with a certificate of the town clerk that it had been duly recorded. It reads:

"\$385.

Newbury, Vt., June 9, 1902.

"Lien Note.

"For value received, I hereby promise to pay F. E. Kimball or order the sum of F. E. Kimball — dollars, \$50 payable August 9, 1902, and \$50 every two months thereafter until note is paid, with interest annually, payable at the National Bank of Newbury, Wells River, Vt.

²⁸³ "This note is given for one chest mare and one chest horse, one Ryan wagon, and four harnesses known as the Lowd harnesses, and one pole known as the Ryan pole, this day conditionally sold and delivered by F. E. Kimball to me, and said property is to be and remain the property of the said F. E. Kimball until said note is fully paid.

"V. V. LAWRENCE."

The defendant afterward bought the horses of Lawrence and paid their full value, with no other notice of the lien than what appeared by the record.

Vermont Statutes, 2290, provides that no lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser shall be valid against attaching creditors or subsequent purchasers, unless the vendor of such property takes a written memorandum, signed by the purchaser witnessing such lien, and the sum due thereon, and causes it to be recorded, etc.

The only question in the case is whether the writing signed by Lawrence was a sufficient memorandum to meet the requirements of the statute.

The writing of the name, "P. E. Kimball," after the words, "the sum of," was clearly a clerical error, and the name in that place should be read out of the note. The question then is whether the figures, "\$385," in the margin can be employed to give an interpretation to the note, which, upon its face, does not contain a promise to pay any definite sum, except fifty dollars, which evidently was the first installment of the principal. Can the marginal figures be resorted to for the purpose of ascertaining the principal?

The authorities are not fully in accord in respect to the use of marginal figures in interpreting the body of the note. Where the note is written in plain, unambiguous terms these marginal figures have no use other than convenience of reference, which was the primary purpose in placing them upon the note. In some jurisdictions it is held that the figures form no part of the note: *Bank v. Hyde*, 13 Conn. 279; *Smith v. Smith*, 1 R. I. 398; 53 Am. Dec. 652; 4 Ency. of Law, 130, and notes. It was held in *Prim & Kimball v. Hammel*, 134 Ala. 652, 93 Am. St. Rep. 52, 32 South. 1006, that the alteration of the marginal figures was not a material alteration of the note for the reason that they were not a part of the instrument.

It is well settled that when there is a variance between the amount expressed in words and the marginal figures, the words must control.

In *Sweetser v. French*, 13 Met. 262, the promise was "to pay three hundred" and there being in the margin "\$300," the note was held good for that sum. In *Witty v. Michigan Mut. Life Co.*, 123 Ind. 411, 18 Am. St. Rep. 327, 24 N. E. 141, 8 A. 365, the number of dollars was left blank in the body of the note, but "\$147.70" appearing in figures in the margin, was held that they should be taken as the amount intended to be paid. In the same direction are *Petty v. Fleishel & Smith*, 31 Ill. 286, 98 Am. Dec. 524, and *Corgan v. Frew*, 39 Ill. 31, 89 Am. St. Rep. 286.

Other cases hold that everything appearing upon a promissory note at the time of its delivery is to be regarded as a part of the note: *Bank v. Freency*, 12 S. Dak. 156, 76 Am. St. Rep. 594, and notes, 80 N. W. 186, 46 L. R. A. 732.

It cannot be maintained that, inasmuch as one sum of fifty dollars, and perhaps two sums of that amount, are described in the body of the note as definite sums to be paid, they are to control and cannot be changed by the figures in the margin. The fifty dollar payments are clearly installments of a principal sum that is not described in the body of the note, and the same rule²⁹⁵ should apply as in cases where the sum to be paid is left entirely blank.

While the authorities differ about filling the blank with the amount indicated by the marginal figures, the weight of authority favors it. It is concisely stated in the note to *Witty v. Michigan Mut. Life Ins. Co.*, 123 Ins. 411, 18 Am. St. Rep. 327, 24 N. E. 141, 8 L. R. A. 365, as follows: "Notes should express the sum for which they are given in the body of the instrument; but an omission of the sum will not be fatal or render the note invalid if the true amount can be gathered from other parts of the writing. . . . A defect existing in the amount stated in the body of the note, the figures upon the margin may be referred to for the purpose of removing any ambiguity, or even to supply the amount, which has been wholly omitted in the body of the instrument." Mr. Freeman, however, admits that there are authorities that refuse to adopt this rule.

Daniel on Negotiable Instruments, fifth edition, section 86, as to the sums payable in promissory notes, says in substance that it is usually specified in figures in the upper, or lower, left-hand corner of the instrument, as well as in writing in the body of it; that these marginal figures are really not a part of the instrument, but merely a memorandum of the amount; that the marginal figures were probably added at a very early date in order that the amount of the bill might strike the eye immediately, and was in fact a note, index or summary of the contents of the bill which followed. Quoting directly from this section: "Where a difference appears between the words and figures, evidence cannot be received to explain it; but the words in the body of the paper must control; and if there is a difference between printed and written words, the written must control. If the words are so obscurely written or printed as to be indistinct, the figures in the margin may be referred²⁹⁶ to to explain

them. If by inadvertence the amount is expressed in ~~the~~ only, it will suffice."

The words "three hundred and eighty-five dollars" should read into the body of the note. The defendant had no right to understand that fifty dollars or one hundred dollars was all that was to be paid. The figures in the margin were notice to him of the amount for which the note was given. The judgment for three hundred dollars, the value of the horses at the time of the conversion, was correct.

On November 6, 1902, Orvill v. Lawrence, a son of the maker of the lien note, gave the plaintiff a chattel mortgage upon the property, and stated in the mortgage that he had purchased the property described in the lien note; that the mortgage was given as additional security for the payment of that note in consideration of the plaintiff's forbearing to take possession of and foreclose on the property described in the note for a space of one week thereafter. The plaintiff's taking this mortgage did not affect his prior lien and was an immaterial fact in the case.

Judgment affirmed.

That Marginal Figures in a note may be referred to for the purpose of determining the amount for which the instrument was given when the amount has been omitted from the body of the paper, see *Witty v. Michigan Mut. Life Ins. Co.*, 123 Ind. 411, 18 Am. St. Rep. 327, and consult the cases cited in the cross-reference note therein. But if the marginal figures do not correspond with the amount written in the body, the latter will, according to *Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52, control.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

KOHN v. FISHBACH.

[36 Wash. 69, 78 Pac. 199.]

SALES—Fraud—Stock of Goods in Bulk.—One who buys a stock of goods in bulk without complying with the statute requiring him to demand a list of the seller's creditors, and to see that the purchase price is applied to their payment, holds the goods as a trustee for such creditors, and is liable to them in garnishment, although he is not indebted to the seller and has disposed of the goods. (p. 944.)

The statute involved in the principal case in so far as its provisions are necessary to a correct understanding of the opinion therein, is commonly known as the "Sale in bulk act" (Wash. Laws, 1901, p. 222), section 1 of which is as follows:

"It shall be the duty of every person who shall bargain for or purchase any stock of goods, wares or merchandise in bulk, for cash, or on credit, before paying to the vendor, or his agent, or representative, or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note, or other evidence therefor, to demand of and receive from such vendor, or agent, or if the vendor or agent be a corporation, then from the president, vice-president, secretary or managing agent of such corporation, a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness, due or owing, and to become due or owing, by said vendor to each of such creditors; and it shall be the duty of such vendor or agent to furnish such statement." Section 2: "Whenever

any person shall bargain for or purchase any stock of goods, wares, or merchandise, in bulk, for cash or on credit, and shall pay any part of the purchase price, or execute or deliver to the vendor thereof, or to his order, or to any person for his use, any promissory note, or other evidence of indebtedness for said purchase price, or any part thereof, without first having demanded and received from said vendor or his agent, the statement provided for in section 1 of this act, and without paying or seeing to it that the purchase money of said property is applied to the payment of the bona fide claim of the creditors of the vendor, as shown upon such statement, share and share alike, such sale or transfer shall be fraudulent and void." Section 4 of the same act (page 224) defines what is a sale in bulk as follows: "Any sale or transfer of a stock of goods, wares or merchandise out of the usual or ordinary course of business or trade of the vendor, or whenever substantially the entire business or trade therefor conducted by the vendor, shall be sold or conveyed or whenever an interest in or to the business or trade of the vendor is sold or conveyed, or attempted to be sold or conveyed, shall be deemed a sale and transfer in bulk in contemplation of this act."

Sharpstein & Sharpstein, for the appellant.

P. J. Cavanaugh, for the respondent.

☞ DUNBAR, J. This action was commenced by plaintiff against defendant on February 24, 1903, by the filing of an affidavit for a writ of garnishment directed to said defendant, said affidavit alleging that defendant was indebted to one Sol Hardman, and had in his possession and under his control personal property belonging to said Hardman. The answer was a denial of these allegations. The reply set up the fact that Hardman had engaged in a retail business in Walla Walla county, and, while so engaged, had become indebted to plaintiff for goods, purchased from plaintiff, and used in said retail business as a part of the stock in trade; while so indebted, respondent purchased ⁷⁰ said stock from Hardman, paying to Hardman the purchase price of said stock, without complying with the provisions of an act, "An act to regulate the purchase, sale, transfer, and exchange of stocks of goods, wares, or merchandise, prescribing penalties for the violation thereof":

222.

The court found upon the trial, in substance, the following facts, viz.: That between the twenty-fifth day of March, 1897, and the eleventh day of April, 1901, said garnisher, plaintiff in the principal case, sold and delivered to one Sol Hardman, defendant in the principal case, who was then carrying on the business of a retail liquor and cigar dealer at Waitsburg, in Walla Walla county, divers and sundry goods, wares, and merchandise, to be used by the said Hardman in his said business, and which became a part of his stock of merchandise used therein; that, after making divers and sundry payments, Hardman was indebted to said garnisher on the thirteenth day of December, 1901, on said sale of goods, in the sum of two hundred and eighty-one dollars and nineteen cents; that on the tenth day of March, 1902, Hardman, in consideration of the sum of fourteen hundred and thirty-five dollars, sold and delivered to said garnishee his said stock of goods, wares, and merchandise, in bulk; and that the said garnishee, upon the purchase of said stock, settled with Hardman and paid him therefor, without having obtained from him his verified statement of his indebtedness on account of the purchase of said stock, or of the names of his creditors, and without seeing that the purchase price of the goods was applied to the payment of the bona fide claims of his said creditors, and without paying said claims of said garnisher, who was then one of his creditors to the extent and amount above stated; that the stock of goods, wares, and merchandise, was, at the time of said sale of said Hardman to ⁷¹ said garnishee, worth more than the amount of said indebtedness of Hardman to the garnisher; that afterward, on the twelfth day of March, 1902, said garnishee sold and delivered to one Grossmiller, for a consideration which the evidence did not disclose, said business and said stock of goods, and wholly parted with the possession and control thereof; found that the action had been commenced by the garnisher against Hardman for the recovery of the aforesaid indebtedness and judgment recovered, and that the writ of garnishment had issued; but found that, at the time of the service of said writ of garnishment, said garnishee was not indebted to Hardman in any sum whatever, and had not in his possession or under his control any personal property or effects of Hardman; and, as a conclusion of law, found that said garnishee was entitled to the judgment and order of the court discharging him, and was entitled to recover, by said order and judgment, his costs and disbursements. Judgment.

was entered in accordance with the findings, and from such judgment this appeal is taken.

It seems to us that the court placed too literal a construction upon the statute, which provides that the garnishee is amenable to the writ, first, where, at the time of its service upon him, or at the time of answering it, he was indebted to defendant in the action to which the garnishment proceeding is auxiliary; or, second, where at one of those times, he had in his possession or under his control personal property or effects belonging to such defendant. It is true, the garnishee answered, and probably in accordance with the facts, that he did not at that time have any of the property of the defendant in his possession, and that he was not indebted to him. But, in contemplation of law, he had the property of the defendant in ⁷² his hands, because, having purchased the property in fraud of law, without complying with the provisions of the law in relation to sales of property in bulk, he stood in the position of a trustee of the property, responsible to the cestui que trust or the creditors for the disposition of such property. It is unnecessary to cite authorities on the general proposition, for it has been held by this court, in *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003, that such was the position of the purchaser who purchased without complying with the law, the court saying: "We are all of the opinion that the sale of these goods was a sale in bulk, within the contemplation of the act, which also provides that such sale shall be void. We also think that the object of this law was to hold the goods of debtors under such circumstances as a trust fund for the benefit of all the creditors, and to hold the purchaser in possession as a trustee for such creditors." See, also, *Millar v. Plass*, 11 Wash. 237, 39 Pac. 956.

As to the proposition that the evidence does not show the value of the property, at the time the same was disposed of by the fraudulent vendee, the findings of fact show that the garnishee purchased this property, paying therefor fourteen hundred and thirty-five dollars, and that the same was of more value than the amount appellant claimed.

The judgment will be reversed, and the cause remanded with instructions to proceed in accordance with this opinion.

Fullerton, C. J., and Hadley and Mount, JJ., concur.

In the Subsequent Case of Holford v. Trewella, 36 Wash. 654, 79 Pac. 308, it appeared that one Kennedy sold his saloon and restaurant business, including all his stock and fixtures, to one Trewella. The

purchaser did not in any manner comply with the provisions of what is commonly known as the "sale in bulk statute": Wash. Laws 1901, p. 222. The Grinsfelder Company, a creditor of Kennedy, was in no wise paid out of the purchase money of such sale. Said company assigned its claim to the plaintiff Holford, who brought an action thereon in the lower court and caused a writ of "garnishment to be served on the garnishee defendant, Trewella. Immediately after the sale of his business, Kennedy left the state, and the summons in the main action was served by publication. The plaintiff recovered judgment against the defendant Kennedy for the sum of one hundred and thirty-five dollars, and the court rendered a judgment against the garnishee defendant for a like amount." The garnishee defendant appealed. The appellate court, in deciding the questions involved, said: "There is no merit in the objection that the judgment against Kennedy was rendered upon service of summons by publication, under the circumstances herein stated. The case of Kohn v. Fishbach, 36 Wash. 69, ante, p. 941, 78 Pac. 199, is decisive of the other questions presented on this appeal."

The Constitutionality of Statutes regulating the sale of goods in bulk is discussed in *Squire v. Tellicz*, 185 Mass. 18, 102 Am. St. Rep. 322; *Black v. Schwartz*, 27 Utah, 387, 101 Am. St. Rep. 971, and note.

When a Sale of Goods in Bulk is made without demanding a list of the seller's creditors as required by a statute declaring such a sale void, the buyer is not liable to the seller's creditors in a direct action at law. Their only remedy is an action of attachment or garnishment: *Rothchild Brothers v. Trewella*, 36 Wash. 679, post, p. 973.

STATE v. NELSON.

[36 Wash. 126, 78 Pac. 790.]

BURGLARY—Intent to Commit Larceny—General Owner of Property Depriving Keeper of Special Property Therein.—The owner of a horse who unlawfully breaks and enters a boarding-stable wherein the horse is being kept by another, with intent to fraudulently and feloniously take the horse from and deprive such other of his lien and the amount due him for feeding and caring for the horse, is guilty of a burglarious entry with intent to commit larceny. (p. 947.)

LARCENY—General Owner Depriving Keeper of Special Property.—If personal property is in the possession of another than the general owner by virtue of some special right or title, as bailee or otherwise, the taking of the property by the general owner from such person in possession is larceny, if done with the felonious intent of depriving such person of his rights. (p. 948.)

E. K. Pendergast, for the appellant.

¹²⁷ **HADLEY, J.** This action was commenced by the filing of an information containing the following averments and charges, viz.:

purchaser did not in any manner comply with the provisions of what is commonly known as the "sale in bulk statute": Wash. Laws 1901, p. 222. The Grinsfelder Company, a creditor of Kennedy, was in no wise paid out of the purchase money of such sale. Said company assigned its claim to the plaintiff Holford, who brought an action thereon in the lower court and caused a writ of "garnishment to be served on the garnishee defendant, Trewella. Immediately after the sale of his business, Kennedy left the state, and the summons in the main action was served by publication. The plaintiff recovered judgment against the defendant Kennedy for the sum of one hundred and thirty-five dollars, and the court rendered a judgment against the garnishee defendant for a like amount." The garnishee defendant appealed. The appellate court, in deciding the questions involved, said: "There is no merit in the objection that the judgment against Kennedy was rendered upon service of summons by publication, under the circumstances herein stated. The case of *Kohn v. Fishbach*, 36 Wash. 69, ante, p. 941, 78 Pac. 199, is decisive of the other questions presented on this appeal."

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E. K. Pendergast, for the appellant.

127 **HADLEY, J.** This action was commenced by the filing of an information containing the following averments and charges, viz.:

A number of English and American decisions in support of the above text, and we need not further cite them. We think the court erred in sustaining the demurrer to the information. The judgment is therefore reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer.

Fullerton, C. J., and Mount, Dunbar and Anders, JJ., concur.

One Who Takes His Own Property with an intent to charge another with its value or to deprive him of a lien thereon may be guilty of larceny: See the monographic note to People v. Miller, 88 Am. St. Rep. 596, on the crime of larceny.

The Essentials of the Crime of Burglary are discussed in the monographic note to People v. Richards, 2 Am. St. Rep. 323-330.

WHITE v. SEATTLE, EVERETT AND TACOMA NAVIGATION COMPANY.

[36 Wash. 281, 78 Pac. 909.]

CARRIERS—Passengers—Injury While on Wharf.—A person with a round-trip ticket for passage upon a steamboat, who is injured while upon the steamer company's dock, waiting for the arrival of the steamboat to commence the return trip, is a passenger, and the law governing common carriers applies to the case. (p. 950.)

CARRIERS—Negligence—Unsafe Dock.—A common carrier by steamboat must keep in reasonably safe condition its wharves or docks, upon which passengers are invited for the purpose of boarding its boats, and maintaining a dock with a hole in it large enough to admit a human leg is negligence. (p. 950.)

CARRIERS—Passengers—Negligence.—A passenger, while waiting on a steamship company's dock for the purpose of boarding an incoming steamboat, is not guilty of contributory negligence in deviating from a straight or direct line between the entrance to the dock or waiting-room, and the entrance slip to the boat, and such passenger has a right to rest on the presumption that the whole dock is maintained in such manner that it can be traversed without imperiling life or limb. (p. 951.)

McClure & McClure, for the appellant.

Easton, Carr & Gilman, J. M. Gephart and I. Bronson, for respondents.

DUNBAR, J. This is an action for personal injuries sustained. Appellant, who was reading

tle, had gone to Edmonds on one of the morning trips steamer "City of Everett," and, having paid for a round and a return ticket to Seattle from Edmonds. About 8 on the evening of January 3, 1903, she went to the dock he intention of returning on said steamer, expecting to passage when the steamer arrived at Edmonds at 8:15. Light was dark, and she was accompanied by Guy Kings- who carried a lantern. They reached the dock before the er arrived. After walking about the dock for a while, went to the southwestern corner of the dock, and there ap- nt sat down upon the stringer running around the outer of the dock, while Mr. Kingsbury stood near, holding the ern. While sitting there, the boat whistled, and appellant, ping forward, stepped into a hole in the floor of the dock, e two feet long and four or four and a half inches wide, h such force as to jam her right foot and leg into the hole, l up to her knee. The floor of the dock had to be pried up release her, and the damages she suffered were the result of is accident. Suit was brought for the sum of three thousand e hundred and twenty-five dollars.

284 The dock was about eighty by one hundred feet in size. diagram in the briefs of both appellant and respondents, and he testimony, show that the dock was about one hundred feet rom north to south. About the center of the west side of the lock, the steamers land. A water tank about ten feet wide is in the center of the dock, the steamers landing, when going north, on the north side of the water tank, and when going south, on the south side of the tank, leaving a space of about ten feet between the water tank and the end of a rack of wood, both on the north and south of the water tank. On the south side of the water tank, this rack of wood is about thirty feet long and eight feet wide, extending within twelve or fifteen feet of the south side of the dock. Another rack of wood of the same description was located on the south margin of the dock, about eighteen inches from the extreme southern portion of the dock, commencing some twelve or fifteen feet from the southwest corner of the dock, leaving a space between the nearest edges of the two different racks of wood of about eight feet, and a space inside of the dock and between the two racks of wood of from twelve to fifteen feet. It was in this sp tween the south end of the rack of wood on the west si dock and the west end of the rack on the north side of that the accident occurred.

The court found as a matter of fact that the appellant was a passenger on the boat and was waiting for the boat at the time of the accident. The testimony in this case is not conflicting and in showing the facts there is very little dispute. The court shows that they were about as stated in the evidence. The boat was viewed and the cause was tried by the court. The court found that there was a waiting-room at the dock where the plaintiff went upon the dock to the boat and in ascending upon the steamer; that it was a common practice that instead of stopping at the waiting-room, passengers would go to the southwest corner of the dock where the boat was to land, and where she would have to be in order to take the boat as a passenger, and that in going around to the southwest corner of the dock, she was acting in a manner for her own protection; that in doing so she was guilty of gross negligence which greatly contributed to her injury, and the defendants were not guilty of negligence. As well as this the court found that judgment should be entered in favor of the defendants, and judgment was so entered. There is this appeal.

The court understood upon what theory the court found that the defendants were not guilty of negligence. The law is well settled by numerous cases of authority that it is the duty of common carriers, whether of steamboats or railroads, to keep in reasonably safe condition wharves, docks, or platforms upon which passengers are invited for the purpose of boarding and alighting. The maintaining of a dock with a hole in the side of the hole which was conceded to be in this dock was certainly negligence, for it was a peril to anyone frequenting that portion of the dock.

Now we think that the appellant was guilty of contributory negligence in going to that portion of the dock to which she went, under the circumstances. The testimony shows that it was common for passengers waiting for the boat at that part of the dock where the plaintiff was injured, and it was frequented as much as any other part of the dock. It is a matter of common observation and knowledge generally, while waiting for boats, move around on different portions of the docks and platforms on passengers, and do not confine

themselves to any particular space directly in front of the entrance slip, or to the regulation little, stuffy, untidy waiting-rooms which generally occupy some portion of the wharf. It would be impracticable and wrong, in the face of custom and of human nature, to hold that anyone who deviated from a direct line from the entrance to a dock to the entrance of a boat was guilty of contributory negligence in case of an injury; and, if the theory of the respondents here is correct, any deviation at all which was unnecessary would constitute such negligence. The boundaries of this dock were well defined by the stringers or wall upon which the appellant sat, and which she testified was about two feet high. Her deviation from the straight line between the waiting-room and the entrance slip to the boat was only about thirty feet. We think she had a right to rest on the presumption that the dock was maintained in such a way that it could be traversed without imperiling life or limb. It seems to us that the honorable trial court committed error in dismissing the action, and the judgment will, therefore, be reversed, with instructions to grant a new trial.

Fullerton, C. J., and Anders, Mount and Hadley, JJ., concur.

One Who Has Purchased a Ticket and is waiting at the depot to take the train is a passenger. So is a person upon the gangplank of a steamboat, going thereon for the purpose of taking passage: See the monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 80, 81.

Every Carrier of Passengers owes them the duty to keep its station platforms in a reasonably safe condition, and passengers have a right to assume that they may safely pass across such platforms: Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516, and cases cited in the cross-reference note thereto. See, too, Klugherz v. Chicago etc. Ry. Co., 90 Minn. 17, 101 Am. St. Rep. 384, and cases cited in the cross-reference note thereto; and compare Dobbins v. Missouri etc. Ry. Co., 91 Tex. 60, 66 Am. St. Rep. 856. Railroads must keep their depots and approaches thereto in a safe condition for passengers: Barker v. Ohio River R. R. Co., 51 W. Va. 423, 90 Am. St. Rep. 808; Johns v. Charlotte etc. R. R. Co., 39 S. C. 162, 39 Am. St. Rep. 709.

1901; in this that the said Ronald Aubrey, then and there being, did unlawfully and knowingly practice horseshoeing as a master horseshoer for hire, in the city of Tacoma, said county and state, said city being a city of the first class, and without registering as such in accordance with the provisions of said act, contrary to form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington. Wherefore, said complainant prays that the said defendant may be arrested and dealt with according to law."

The main contention of relator's counsel is that the above enactment, under which petitioner was arrested and held in custody by respondent, is unconstitutional and void, under the provisions of both the state and federal constitutions, in that it deprives relator of his liberty and property without due process of law, and denies to him the equal protection of the laws. The enactment in question is found in the session laws of Washington, 1901, page 116, chapter 67, and is entitled, "An act requiring horseshoers in cities of the first, second and third classes in this state to pass an examination, and providing for a board of examiners in said cities, and providing a penalty for the violation of the provisions of this act, and repealing an act entitled 'An act requiring horseshoers to pass an examination, and providing for a board of examiners,' approved March 13, 1899."

Sections 1 and 2 of this act provide for the registration of master and journeyman horseshoers in cities of the classes above named. Section 3 provides for the issuance of certificates to such horseshoers. Section 4 provides that: ³¹² "In every city affected by this act, there shall be appointed a board of examiners consisting of one veterinary and two master horseshoers and two journeyman horseshoers, which shall be called 'horseshoers' board of examiners,' who shall be residents of such city, and whose duty it shall be to carry out the provisions of this act, and shall have a power to fix a standard of examinations to test the qualifications of applicants. The members of said board shall be appointed by the mayor of such city, and the term of office shall be five (5) years, except that the members of said board first appointed shall hold office for the term of one, two, three, four and five years, as designated by the mayor and until their successors shall be duly appointed. The board of examiners shall have a regular place of meeting and shall hold sessions for the purpose of examining applicants desiring to practice horseshoeing as master or journeyman horseshoers in

The first of these is the fact that the medical profession has been largely unresponsive to the needs of the community. The second is the fact that the medical profession has been largely unresponsive to the needs of the community.

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The ninth is the fact that the medical profession has been largely unresponsive to the needs of the community. The tenth is the fact that the medical profession has been largely unresponsive to the needs of the community.

care the most important interests, and it is an almost imperious necessity that only persons possessing skill and knowledge should be permitted to practice medicine and surgery."

In the case of *State v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110, we held that the ³¹⁴ laws of this state relating to the practice of dentistry (Sess. Laws 1901, p. 315, amending the dentistry act of 1893) fell within the exercise of the police power of this state, and hence were not unconstitutional on the ground of infringement of individual rights. At page 497 in this volume it is observed in the opinion of the court that: "The wisdom of such regulations, pertaining not only to dentistry, but also to the practice of medicine and surgery, is apparent. It is of the highest importance to the state that suffering and afflicted humanity shall not be subjected to the care and treatment of unlearned and unskilled persons. In its effort to prevent such a misfortune to its people, the state may adopt a standard for the test of fitness to engage in the work of what should be a learned profession."

No argument is needed to show that the practice of the above professions is closely related to the health and comfort and welfare of the people. In fact, it is a matter of common knowledge that the practice of medicine and surgery by unskilled parties may seriously affect or endanger the very life of individuals treated or operated upon. The exercise of the police power by the state, within its proper sphere, is well calculated to promote and safeguard the public welfare and subserve the best interests of society. But this power, however comprehensive it may be under our fundamental law, has its limitations. In *Re Jacobs*, 98 N. Y. 108, 110, 50 Am. Rep. 636, Earl, J., says: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. . . . Generally, it is for the legislature to determine what laws and regulations are needed to protect the public health ³¹⁵ and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded."

Again, in *Slaughter-house Cases*, 16 Wall. 36, 87, Mr. Justice Field observes: "All sorts of restrictions and burdens are

known under the police power, and when there are no
 in conflict with any constitutional provisions, or fundamental
 principles, they cannot be successfully assailed in a judicial
 tribunal. . . . But under the pretense of prescribing a police
 regulation the state cannot be permitted to encroach upon any
 of the great rights of the citizen, which the constitution intended
 to secure against encroachment."

It may be stated as a general principle of law, that it is the
 province of the legislature to determine whether the conditions
 exist which warrant the exercise of this power; but the ques-
 tion what the subjects are of its exercise, is clearly a judicial
 question. The way is measured by his liberty, and his constitu-
 tional rights. Liberty may be withheld, without the actual imposi-
 tion of restraint of his person. "Liberty" in its broad sense,
 is understood in this country, means the right, not only of free-
 dom from actual servitude, imprisonment, or restraint, but the
 right of man to use his faculties in all lawful ways, to live and
 work where he will, to earn his livelihood in any lawful calling,
 and to pursue any lawful trade or avocation. All laws, there-
 fore, which impair or diminish these rights—which limit him
 in his choice of a trade or profession—are infringements upon
 his fundamental rights of liberty, which are under constitutional
 protection.

See In re People v. Warren of City Prison, 144 N. Y. 529, 39
 N. E. 100, 17 L. E. A. 713, the court held that chapter 602 of
 the Laws of 1904 of the state of New York, which provided for
 the creation of a board for the examination of plumbers, and
 which prohibited any person to exercise the calling of a mas-
 ter plumber without passing an examination before such board,
 was a valid exercise of the police power, for the reason that the
 work of plumbing is essential to the comfort and health of the
 inhabitants of cities. The decision was rendered by a divided
 court. Three members of the above court dissented. Justice
 Peckham, who afterward became an associate justice of the su-
 preme court of the United States, delivered a strong dissenting
 opinion in which the following language occurs: "The legisla-
 ture probably provide for a sanitary inspection of plumb-
 ing, and thus secure a kind of work, as to its system and
 which might fairly be said to tend toward the pro-
 tection of the health of the general public. But the trade of the
 plumber is not one of the learned professions, nor does
 a plumber hold himself out in any manner as an ex-
 ercise of 'sanitation,' nor is any such knowledge

expected of him, and this act, when practically enforced, may or may not exact it of him."

Assuming, for the purpose of the present controversy, that the propositions announced by the majority of the court in the New York case last cited are good law, still, we think that there is a marked distinction between the business of plumbers and that of horseshoers, in the matter of the pursuit of their respective avocations in cities. The plumber's business may concern and directly affect the health, welfare, and comfort of the inhabitants who have occasion to call such services into action in the community in which he plies his vocation, while the pursuit of the trade of a horseshoer, under ordinary circumstances and normal conditions, would have no such effect.

The supreme court of the United States in *Allgeyer v. Louisiana*, 165 U. S. 589, 17 Sup. Ct. Rep. 427, 41 L. ed. 832, in defining the word "liberty" as the same appears in the fourteenth amendment of the federal constitution, uses this language: "The liberty mentioned in that amendment means not only the right of the citizen to be free from mere physical restraint of his person by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The opinion of the court in that case was delivered by Mr. Justice Peckham, who wrote the dissenting opinion in *People v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, as above noted. The only cases directly upon the point are from Illinois and New York, in each of which an enactment similar to the one here in question is held unconstitutional, as being an arbitrary interference with personal liberty and private property of the citizen without due process of law: *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; *People v. Beattie*, 89 N. Y. Supp. 193, 96 App. Div. 383.

It seems to us that these cases state the correct rule. We conclude, therefore, that the act complained of cannot be sustained as a legitimate exercise of the police power, under the fundamental law of this state, and that the prayer of petitioner must be granted. The petitioner is discharged.

The Legislature is competent to require a barber to obtain a license as a condition to his right to follow his calling: State v. Zena, 73 Minn. 80, 79 Am. St. Rep. 422; State v. Sharpless, 31 Wash. 191, 94 Am. St. Rep. 893; or a plumber: State v. Gardner, 58 Ohio St. 322, 65 Am. St. Rep. 755; or an engineer: St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560, 61 Am. St. Rep. 474; or a guide: State v. Snowman, 94 Me. 99, 50 Am. St. Rep. 300.

LYNCH v. KINETH.

[36 Wash. 363, 78 Pac. 923.]

ANIMALS—Runaway Horses.—The owner of a team of vicious and "runaway" horses is liable for injury inflicted by them, without proof of negligence or fault in endeavoring to prevent such injury. (p. 960.)

ANIMALS—Runaway Horses.—Knowledge of the vicious and runaway character of a horse by one employed to drive it is imputed to its owner. (p. 960.)

ANIMALS—Runaway Horses—Contributory Negligence—Question for Jury.—If a person is injured while on the public highway by being run into by the runaway team of another, alleged to be vicious and in the habit of running away, and driven by an incompetent servant, the questions whether the team was really a "runaway" team, and whether plaintiff was guilty of contributory negligence are for the jury to determine if the evidence is conflicting. (p. 961.)

J. Anderson and Coleman & Ballinger, for the appellant.

L. Still, H. W. Craven and T. T. Littell, for the respondents.

³⁰⁸ **DUNBAR, J.** This action was brought by appellant to recover ten thousand seven hundred and fifteen dollars, as damages for personal injuries which ³⁰⁸ he claims to have sustained by reason of certain so-called negligent acts of respondents. It is alleged that on or about July 25, 1902, the respondents were the owners of a team of horses which were wild, and vicious, and given and addicted to running away, respondents, knowing said horses to be of such disposition, left them on that day to be driven upon the public highway by one Wanamaker, the driver of said horses on said day, who was then and there careless and incompetent to manage said team, all of which was well known to the respondents at the time, and on said date, while said team was being driven in the service of respondents on the public highway in said county, the said team, in accordance with its wild and vicious propensities, became ungovernable, and ran away with

the wagon to which it was attached; that the driver did not control them, but leaped from the wagon, allowing the team, with said wagon, unattended, to continue running away on said highway, at a tremendous and reckless speed; that appellant was, at the time, riding on a load of lumber on said highway, going in an opposite direction, exercising due care and caution, when suddenly said team, still attached to their wagon, dashed, at great speed and with no one to guide or control them, around a bend in the road, and struck the wagon on which the appellant was riding, with great force, overturning the same, throwing the appellant violently to the ground, and throwing the lumber upon him, inflicting the injuries complained of. The answer denied any negligence on the part of the respondents, and alleged contributory negligence on the part of the appellant. Upon the conclusion of the introduction of appellant's evidence, the respondents moved for a nonsuit, which motion was sustained by the court. The cause was dismissed, and judgment for costs ³⁷⁰ entered against the appellant. From this judgment this appeal was taken.

It is the contention of the respondents, in brief, as gathered from a citation from the case of *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310, that there is no rule of law which compels a person driving horses upon a highway to keep them absolutely under control; that he is bound to exercise only that degree of diligence and care which a man of ordinary prudence might be expected to exercise under the same circumstances; that, in the course of the affairs of life, accidents must happen and, if they are not attributable to the breach of some legal duty owing to the sufferer, he is without legal right to complain. This, no doubt, is a correct statement of the law, but its application to the circumstances of this case is not discernible. The testimony is comparatively brief, and shows, in effect, that the team which was the cause of the injury was the team of respondents; that this team was in the habit of running away—that is to say, that it had run away several times—often enough, we think, to warrant the submission to a jury of the question whether it was a vicious team, addicted to the runaway habit. The highway is intended for the use of anyone who desires to use it, and no one has a right to use it to the exclusion of others, or in a manner as to imperil the rights of others; and the degree of care which would be required of one driving a horse that has a reputation for running away would be a greater degree of care than that required of the driver of a horse which was

to be gentle, reliable, and biddable. The general rule is thus stated in 2 Cyclopaedia 368:

"The owner or keeper of a domestic animal not naturally inclined to commit mischief, while bound to exercise ordinary care to prevent injury being done by it to ³⁷¹ another, is not liable for such injury if the animal be rightfully in the place when the mischief is done, unless it is affirmatively shown, not only that the animal was vicious, but that the owner or keeper had knowledge of the fact. When such scienter exists, the owner or keeper is accountable for all the injury such animal may do, without proof of any negligence or fault in the keeping, and regardless of his endeavors to so keep the animal as to prevent the mischief."

And in relation to notice, it is stated, at page 378: "Knowledge of a servant or agent of an animal's vicious propensities will be imputed to the master when such servant or agent has charge or control over the animal."

Knowledge of the vicious character of a horse, by one employed to drive it in delivering goods, is imputed to the owner: *Brown v. Green*, 1 Penn. (Del.) 535, 42 Atl. 991. It was shown by the testimony in this case that the several different drivers employed by the respondents knew the tendency of this team to run away, as shown by the testimony of the drivers that the horses had, at different times, run away, or attempted to run away.

The respondents furnish in their brief an extended and earnest argument to show that the instances proven were instances of mild runaways, not exhibiting any particularly vicious tendencies on the part of the horses, but that they either ran under provocation, or did not run with any degree of velocity; while it is contended by the appellant that the testimony shows that the horses were what might be termed, in common parlance, "runaway horsea." The necessity for the argument, outside of the testimony itself, shows that this is a case peculiarly adapted to the investigation of a jury to determine, from all the circumstances shown, the character of the horses in this regard. As early as the report of the case of ³⁷² *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799, 38 Pac. 1119, it was decided by this court that the question of contributory negligence is for the jury to determine, from all the facts and circumstances of the particular case, and that it is — in rare cases that the court is justified in withdrawing it the jury. The same doctrine prevails throughout with

reference to the alleged negligence of defendants, and that has been the uniform holding of this court from that time until the present. In *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679, 36 L. ed. 485, the trial court, in this connection, gave the following instruction to the jury: "You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved, and try it by that standard; and neither the judge who tries the case, nor any other person, can supply you with the criterion of judgment by any opinion he may have on that subject."

The supreme court of the United States, in passing upon this instruction, indorsed it in the following language: "But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note ³⁷³ the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under the same state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

This case was approved by this court in *Steele v. Northern Pac. Ry. Co.*, 21 Wash. 287, 57 Pac. 820, and the announcement of the law in that case has been uniformly adopted as the rule governing damage cases. The court, in the case just above cited, lays down the same rule in regard to contributory negligence, and says there is no more of an absolute standard of

ordinary care and diligence in one instance than in the other. It cannot be determined from the testimony in this case that there could be no doubt as to whether this team was in the habit of running away. It cannot be determined, as a matter of law, that such was not the habit of the team, a determination which would have to be made before the court would be authorized in assuming to take the case from the jury and decide that question of fact itself. The same may be said of the contention of the respondents that the appellant was guilty of contributory negligence.

The judgment will be reversed and the cause remanded, with instructions to grant a new trial.

Fullerton, C. J., and Anders, Hadley and Mount, JJ., concur.

The Owner of a Domestic Animal is not in general liable for an injury committed by it while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such propensity. If, however, the owner knew of the vicious propensity, he must restrain it at his peril, and is answerable for injuries inflicted by it: *Morgan v. Hudnell*, 52 Ohio St. 552, 49 Am. St. Rep. 741; *Clowdis v. Fresno Flume etc. Co.*, 118 Cal. 315, 62 Am. St. Rep. 238; *Crowley v. Groonell*, 73 Vt. 45, 87 Am. St. Rep. 690; note to *Parsons v. Mauser*, 97 Am. St. Rep. 287, 288.

ANDERSON v. SEATTLE-TACOMA INTERURBAN RAILWAY COMPANY.

[36 Wash. 387, 78 Pac. 1013.]

RAILROADS—Negligence—Danger from Third Rail.—A passenger wrongfully ejected from a railroad train a distance from his starting point is not a trespasser while walking back to such point upon the railroad right of way, nor does he in so doing assume the unusual risk of danger from contact with an uncovered and unprotected electrically charged third rail, of which he is not warned, and of which he has no notice or knowledge. (pp. 968, 969.)

RAILROADS—Negligence—Question for Jury—Danger from Third Rail.—If a railroad passenger, while walking back along the railway right of way to his starting point, sustains injury, after being wrongfully ejected from a train, by reason of coming in contact with an unprotected and electrically charged third rail, of the danger of which he has no warning, or knowledge, or notice, the questions for the jury are, the negligence of the railway company, and of the contributory negligence of such injured passenger, are for the jury to decide upon proper instructions, and it is error to withdraw them, and to grant a nonsuit. (p. 970.)

J. M. Epler, for the appellant.

Piles, Donworth & Howe, for the respondent.

³⁹⁹ HADLEY, J. This is an action to recover damages for personal injuries received by the appellant and alleged to have been caused by the negligence of the respondent. The respondent is the owner and operator of an electric railroad between the cities of Seattle and Tacoma. The appellant's complaint alleges that, on the fifth day of October, 1902, he was a passenger on a car of the respondent going from Tacoma to Seattle, and was riding on a ticket purchased by him at Seattle from an agent of the respondent, which ticket entitled him to ride on respondent's cars from Seattle to Tacoma and return; that he was on a car of respondent, riding on said ticket, when the car reached a point about four miles from Tacoma in the direction of Seattle; that the cars were stopped at said point, and one of the men in charge—either the motorman or conductor—twice requested appellant, in a manner amounting to a command, to get off the car; that he did get off, and the car at once started, leaving appellant standing beside the track at a station, the name of which is unknown to him; that, upon being forced to get off the car, he at once started back toward Tacoma, and walked on the ties of the railroad bed; that he had proceeded about a mile, to a point where the roadbed is upon an embankment, elevated some five or six feet, the embankment being quite steep, at which place he saw a bridge a short distance ahead; that, for fear of some accident, he tried to get off the roadbed and down the embankment, and, in his efforts to descend, he reached out his hand and took hold of one of the rails placed and used by respondent on its track, when he received a ⁴⁰⁰ terrible electric shock; that the shock was so severe that it rendered him unconscious, threw him prostrate upon the ground, where he lay in an insensible condition three-quarters of an hour, and, on recovering consciousness, he found he could not use his left hand, arm, or leg, they seeming to be paralyzed; that he was injured about 6:30 P. M., and, after recovering consciousness, he dragged himself along by the aid of his uninjured leg until he reached a hotel in Tacoma, about 1 o'clock A. M.; that respondent company had left said rail so charged with electricity in an exposed position, with no covering over it, and with nothing to protect anyone who should touch it, from receiving the full force of the electric charge borne by the rail; that in so doing respondent was guilty of negligence, and that

by reason of such negligence appellant was injured without fault on his part. The nature and continuing effect of the injuries are also set forth in detail. The answer is a general denial of the material averments of the complaint, and it also affirmatively alleges contributory negligence. A trial was had before the court and a jury. At the conclusion of the plaintiff's evidence, the respondent challenged the sufficiency of the evidence to sustain a verdict in behalf of plaintiff, and moved the court to take the case from the jury, and enter judgment in favor of the defendant, as provided by statute. The motion was granted by the court, and judgment was entered dismissing the action, at plaintiff's costs. The plaintiff has appealed.

The evidence shows that appellant had bought a round-trip ticket for passage over respondent's road from Seattle to Tacoma and return. He had made the trip from Seattle to Tacoma in the afternoon of the day the accident happened. After spending some time in Tacoma, and ²³¹ at about 6 o'clock in the evening, he attempted to get upon one of respondent's cars for the return trip to Seattle. The car was then on Pacific avenue in Tacoma. He approached it from the left side, and just as it was starting he stepped upon the front step. The front door upon that side was closed, and appellant says he thought they were going to open it and let him in, but they did not do so. There is evidence to the effect that, when these cars were afterward flagged across the Northern Pacific railroad tracks in Tacoma, the appellant had sufficient time to go around the car and get into it from the other side. But it also appears from the evidence that he did step off at said place, and that the car started again almost immediately, when he stepped back where he had been standing. Whether there was sufficient time for appellant to have gone around the car and entered it from the right side or not, he in any event did not do so, and remained upon the left front step until the car reached the first station out of Tacoma. Upon reaching this station the motor-man opened the door and told appellant he must get off the car. Appellant stepped with one foot onto the station platform, and the car started immediately. He then jumped back upon the car step, and the car was again stopped, when he was forced to get off. When he was told he must get off he said: "I have got a ticket to go to Seattle. Give me time to get around on the other side and get on the car." But no time was given, and the car immediately moved away. Being thus left, and believing that his business required his return home that night, ap-

pellant immediately started back toward Tacoma for the purpose of trying to get a boat for Seattle. By this time darkness had come on, and appellant, being a stranger to the surroundings, and unacquainted with the topography and highways of the ³⁹² locality, started to walk upon the railroad track, with the result stated in his complaint.

The trial court, when ruling upon the motion for nonsuit, stated, as shown by the record: "I do not think there is any doubt but what the evidence shows that the defendant neglected its duty to the plaintiff in not either permitting him to go in the car from the front door where he was hanging on the outside, or giving him sufficient time to get around to the other side of the train, where he could get in where it was open." The court further stated that he believed appellant would have a cause of action against respondent for wrongfully leaving him at the station, but that he was guilty of negligence when he started to walk on the railroad track, and is not entitled to recover for his injuries. The appellant, however, bases his right to recover upon the theory that respondent negligently put him off the car on the right of way, when that right of way was in an unsafe condition, and without giving him any notice or warning of the danger. He testified that he did not know of the existence of the electrically charged rail, and there is no evidence to the contrary. This accident occurred on the first Sunday after the road was opened for travel. There is evidence that the newspapers had mentioned the matter of this third rail, but it does not appear that appellant knew about it. The evidence shows that neither the motorman nor the conductor, nor anyone else, notified him, or warned him, of the danger, when he was put off the car. It must, therefore, be assumed, for the purposes of this discussion, that he was in absolute ignorance of the presence of danger from such a source. It appears that a notice was posted at the station calling attention to this dangerous rail, but in the darkness appellant did not see it, and knew nothing of it. There were some electric ³⁹³ lights at the station, but he did not see the notice, and started to walk upon the track in entire ignorance of the presence of any danger not ordinarily to be expected when walking upon a railway track. The respondent claims that, having fenced its right of way, and posted the notices as to danger, it thereby discharged its duty in the way of securing the public, and was entitled to use upon its own premises such devices as it chose to operate. It is, therefore, claimed that appellant was

a trespasser upon respondent's premises at the time he was injured, and for that reason cannot recover.

It cannot be said that appellant's presence upon respondent's premises was initiated by trespass. He had, by contract and for a consideration, first entered upon the premises, and had been carried as a passenger from Seattle to Tacoma. The same contract called for his transportation from Tacoma to Seattle; and he therefore not only had a right to be upon the premises, but was there by the invitation and consent of respondent. The conduct of respondent's agents and employes, in forcing him to leave the car, is unexplainable in the light of the evidence in the record. Certainly the demand for speed in modern travel does not call for such zeal on the part of the employes of a railway company that time shall not be given a passenger to get aboard when he has already paid his money, in the usual manner, for his transportation. The fact remains in this instance, however, as appears from the record, that just that thing occurred, and appellant was forced to step from the car upon respondent's right of way. He was, therefore, not a trespasser *ab initio*, and certainly not one up to the time he was left, in the night-time, at a strange place upon respondent's premises. Being thus left upon the premises ³⁹⁴ where he had a right to be, did he thereafter become a trespasser?

It is true, he was left at a station surrounded by farm-houses, but that was only part of the premises to which he had been invited by respondent, when it accepted his money and agreed to carry him as a passenger. He had the right to pass over the entire right of way in respondent's cars, but that right had been denied him. When he was left by respondent, he was not directed to leave its premises, but was merely forced from its cars, and deposited upon its right of way. He was not informed how, in the night-time, he could find his way over the ordinary highways. Being thus left upon the premises, under all these circumstances, did he have no rights greater than those of an ordinary trespasser, when he moved along respondent's track? It is true he was not invited upon the premises as a pedestrian, but he was invited to come for business purposes, and we believe, under all the conditions, that he did not become trespasser in the really tortious sense of that term, even though some elements of technical trespass may have been present. He was, in any event, entitled to the reasonable protection from injury which one human being owes to another when ceded in like situation. Respondent's agents must have known

that, from common experience, the thing appellant was most apt to do was to take the track back to Tacoma. They should, therefore, have seen that he was advised of the danger of such a course because of the unusual and imperceivable danger to an uninformed traveler. Doubtless he was required to take the risk of all ordinary dangers attending a pedestrian upon a railway track, such as contact with moving trains, falling through bridges, and other usual dangers. But since he came upon respondent's ³⁹⁵ premises rightfully, and did not come as a willful trespasser, we think he was not required to take the risk of such an unusual and hidden danger as this third rail. Its character was unknown to him, and its powerful death-dealing force was entirely concealed.

"The great force that was being carried over the wires gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact": *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51, 16 L. R. A. 43, 4 Am. Elec. Cases, 381, 386.

In the case at bar, however, the dangerous agency was not a wire, which, when strung upon insulators, may ordinarily be supposed to be charged with electricity, but it was a common rail, bearing only the appearance of an ordinary rail of a railway track, and disclosing no connective relations which would render it more dangerous than an ordinary piece of iron. If modern transportation methods involve the use of such concealed, unprotected, dangerous, and deadly devices where persons of common experience may be expected to come in contact with them, we believe those who use them should not escape liability unless they exercise such a degree of care to warn and protect those who are injured as the circumstances and surroundings reasonably require. Whether such care is exercised in a given case, becomes a question of fact for the jury. In a case of this kind, the conditions are out of the ordinary and call for care commensurate therewith. To the uninformed, the danger in this rail was as completely hidden as is the danger in the case of a spring gun. It is true, spring guns are usually set for the express purpose of ³⁹⁶ inflicting injury or taking life, while this rail was placed without such intention, but to be applied to the useful purposes of commerce and tra

portation. To one ignorant of the presence of the danger, however, injury follows alike as the result of coming in contact with either device. This court has held that death to an absolute trespasser from the discharge of a spring gun not set to kill any particular person, makes the one who sets it guilty of murder in the second degree: *State v. Barr*, 11 Wash. 481, 48 Am. St. Rep. 890, 39 Pac. 1080, 29 L. R. A. 154. While the absence of criminal intent may remove this case from the domain of crime, yet resultant damage from neglect to sufficiently guard and warn against what is, in itself, an entirely concealed death trap is, in effect, the same as that visited by the spring gun, and is certainly ground for recovery of damages. Whether such neglect exists in this case is for the jury to say, and the same is also true as to whether appellant was guilty of contributory negligence.

The general principle applying to those who go upon premises of another by invitation or inducement for business purposes is well expressed in *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216, as follows: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them and which he has negligently suffered to exist and has given them no notice of."

The above statement of principle exactly covers the relations of respondent and appellant at the time and place the latter was put off the car. If he had, at that place, come in contact with this hidden danger, the stated principle ³⁹⁷ would have completely covered this case without leaving room for argument. The concealed danger was not, however, at that immediate point, but first appeared just outside the station grounds, a few feet away. Unless a radical change of relationship occurred the moment appellant crossed the line between the station grounds and the unprotected third rail, then it did not occur at all. For reasons already stated, we think, as he was not a trespasser in the beginning, he did not become a real trespasser but was on respondent's premises by inducement for business purposes, and being left as he was under the peculiar circumstances, he was not required to measure with exactness any number of square feet of respondent's right of way which occupy and at the same time feel secure from hidden dangers, unless he had been warned of the danger.

We therefore think the authority quoted is applicable to appellant's situation at the time he was injured. The same principle is sustained in the following cases: *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. ed. 235; *Nickerson v. Tirrell*, 127 Mass. 236; *Davis v. Central Cong. Soc.*, 129 Mass. 367, 37 Am. Rep. 368; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Hayward v. Merrill*, 94 Ill. 349, 34 Am. Rep. 229; *Hartwig v. Chicago etc. R. Co.*, 49 Wis. 358, 5 N. W. 865.

Respondent cites a number of cases where the relationship in the beginning was that of trespasser, and so continued until the time of the injury. Such, as we have seen, was not true here. In *Ham v. Delaware etc. Canal Co.*, 155 Pa. St. 548, 26 Atl. 757, 20 L. R. A. 682, cited by respondent, a passenger was wrongfully ejected from a train, and was afterward killed while walking upon the track. The standard set in that case was that the ~~was~~ deceased should have left the track "at the earliest practicable opportunity that a reasonably prudent man would have discovered and seized, and that the plaintiff had the burden of proof that he did so." The question was left to the jury. The same case is also cited by respondent as reported in 142 Pa. St. 617, 21 Atl. 1012, in which the court uses the language that nothing short of "imperious necessity" would have excused the deceased in continuing on the track, but the opinion on the second appeal clearly established the rule above stated as to prudence and care, and left it for the jury to decide the fact in that regard. *Benson v. Central Pac. R. R. Co.*, 98 Cal. 45, 32 Pac. 809, also cited by respondent, was a case where a six year old child was carried with her father beyond her station. She and the father walked back upon the railroad track and the child was struck by a train. Recovery was denied. The accident happened in broad daylight, and, as we have already intimated, one walking upon a railway track under such circumstances, although not a trespasser from the beginning, must, in the absence of wanton negligence on the part of the railway company, take the risk of such ordinary dangers as the running of trains, but that a different rule should apply where a concealed deadly agency is strung continuously along the track, and of which the pedestrian has received no notice. *Webster v. Fitchburg Ry. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521, was a case where a person in possession of a ticket, while running across the company's tracks outside the passenger station, apparently to catch a train about to start, was struck

and killed by another train. Recovery was denied on the theory that he had not yet become a passenger. In any event, whether he was such or not, he was required to look out for such known dangers as running trains when ³⁹⁹ he was upon the tracks. The facts of other cases cited by respondent, we believe, do not bear sufficient analogy to the facts of this case to make a discussion of them profitable here.

For these reasons, we think the questions of negligence and contributory negligence, under the evidence as introduced, were for the jury, under proper instructions. We therefore think the court erred in withdrawing the case from the jury. The judgment is reversed, and the cause remanded with instructions to proceed with a new trial.

Fullerton, C. J., and Dunbar and Anders, JJ., concur.

The Duty and Liability of Electric Corporations are discussed in the monographic note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 515-539.

Persons Walking Along a Railroad Track, using it for a highway, are usually held to assume the risk of so doing: *Schexnadrye v. Texas etc. Ry. Co.*, 46 La. Ann. 248, 49 Am. St. Rep. 321; *State v. Baltimore etc. R. R. Co.*, 69 Md. 494, 9 Am. St. Rep. 436; *Kelly v. Michigan Cent. R. R. Co.*, 65 Mich. 186, 8 Am. St. Rep. 876.

STATE v. O'HARE.

[36 Wash. 516, 79 Pac. 39.]

SEDUCTION—Conditional Promise to Marry.—A direct promise to marry is not essential to the crime of seduction, under a statute making it criminal to "seduce and debauch any unmarried woman of previous chaste character." Under such statute any seductive acts or promises are sufficient, and if a woman, engaged to marry, submits to her intended husband upon his conditional promise to marry her immediately in case he gets her "into trouble," the crime is complete. (p. 972.)

Zent, Lovell & Linn, for the appellant.

C. L. Holcomb and O. R. Holcomb, for the respondent.

⁵¹⁶ MOUNT, J. Appellant was convicted of the crime of seduction. A number of errors are assigned, which are without merit, and which do not require discussion. The principal point relied upon is that the evidence was not sufficient to go to the jury. The prosecuting witness testified, in substance,

that she first met the appellant in July, 1901; that she was then twenty years of age; that she and appellant began keeping company with each other at that time, and continued to do so until the fall of 1902; that the appellant came to her father's house to see her about twice a week, usually on Wednesday and Saturday evenings; that about the 1st of March, 1902, appellant proposed marriage to the witness, and she accepted ⁵¹⁷ the proposal; that the time for the marriage was set for the spring of 1904; that, soon after the engagement, appellant began making proposals for sexual intercourse; that she refused for a week or two, but finally, on March 18, 1902, after appellant had taken her on his lap and fondled her, and assured her that no harm could come of it, and that if he got her into trouble he would marry her right away, she yielded to his solicitations; that after this time she submitted to his desires quite often, until she discovered that she was in a family way, when, on the eighteenth day of July, 1902, she told appellant of her condition and requested him to marry her, which he refused to do. On the fifteenth day of January, 1903, a child was born to the witness. She also testified that she never had sexual intercourse with anyone else. On cross-examination she testified in part as follows:

"Q. And you never did give up, did you? A. Yes, sir, I did. Q. So you consented, did you? A. Under promise of marriage, I did, yes, sir. Q. You consented conditionally then, that he would marry you if he got you into trouble? A. Only so. Q. If he had not promised to marry you right away if he got you into trouble, you would not have consented at the time you did? A. No, sir. Q. If he had not promised to marry you right away if he got you into trouble, you would not have submitted; you relied on this conditional promise? A. If he had not promised to marry me I would not have submitted. Q. Answer the question. A. Of course, if he had not promised to marry me right away if he got me into trouble, I would not have submitted to him."

Appellant's contention is that, because the prosecutrix said she submitted to the appellant only upon the promise that he would marry her right away if he got her into trouble, that she would not have submitted but for ⁵¹⁸ that promise, there was no seduction. Several cases are cited sustaining this position, among them *People v. Ryan*, 63 N. Y. App. Div. 429, 71 N. Y. Supp. 527; *State v. Adams*, 25 Or. 172, 42 Am. St. Rep. 790. 35 Pac. 36, 22 L. R. A. 840; Am. & Eng. Ency. of Law, '

ed., p. 231. But in the states so holding, especially the ones cited, there can be no criminal seduction under the statutes except under promise of marriage. Our statute contains no such provision. It is as follows: "If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. If before judgment upon an indictment the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense": Ballinger's Code, sec. 7066.

This statute does not limit the seduction to those cases only where there is a promise of marriage, as in the cases above cited, but plainly says, "If any person seduce and debauch any unmarried woman of a previously chaste character, he shall be punished." The word "seduce" in this statute is used in its ordinary legal meaning, and implies the use of arts, persuasion, or wiles to overcome the resistance of the female who is not disposed, of her volition, to step aside from the path of virtue. No doubt the most common method of enticing an unmarried, virtuous woman from rectitude is by promises of marriage, but there are other arts, wiles, and promises which may be made, and which may be acted upon by a virtuous woman. If our statute had intended to limit seduction only to those cases where there was a promise of marriage, it would have said so, as has been done in other states. Not having said so, we must conclude ⁵¹⁹ that any seductive arts or promises, where the female involuntarily and reluctantly yields thereto, are sufficient. It is true that, in *State v. Cochran*, 10 Wash. 562, 39 Pac. 155, this court, at page 569, said: "As to bare promises, although the statute says nothing upon the subject, none other than a promise of marriage should be held sufficient." This statement, we think, was not necessary to a decision of that case and was therefore dictum. If, however, it was not dictum, we do not desire to follow it, because the statute is plain. It does not confine seduction to a promise of marriage alone, but, on the other hand, clearly intends that any other seductive promise accomplishing the same result, is equally sufficient. In this case there was an unconditional promise of marriage. The appellant had wooed and won the affections of the prosecutrix. He had promised to become his wife. She relied upon him and believed in him. He then sought her to have sexual intercourse with him. She at first repulsed his advances, but

finally, after several attempts, and under promise that he would marry her at once if he got her into trouble, yielded her virtue to him. Even though she submitted to him, relying solely upon the conditional promise of marriage and upon no other, we think the evidence makes a plain case of seduction under our statute: *State v. Hughes*, 106 Iowa, 125, 68 Am. St. Rep. 288, 76 N. W. 520, 44 L. R. A. 397. Under the facts in this case we think there was a clear case to go to the jury: *Cherry v. State*, 112 Ga. 871, 38 S. E. 341; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159.

There is no error in the record, and the judgment is therefore affirmed.

Fallerton, C. J., and Hadley and Dunbar, JJ., concur.

Whether a Promise of Marriage conditioned on pregnancy will support a conviction for seduction is considered in the monographic note to *Bradshaw v. Jones*, 76 Am. St. Rep. 675, 676.

ROTHCHILD BROTHERS v. TREWELLA.

[36 Wash. 679, 79 Pac. 480.]

FRAUDULENT TRANSFERS—Sale of Goods in Bulk—Remedy of Creditors.—If a sale of a stock of goods in bulk is made without demanding a list of the seller's creditors as required by statute declaring such sale void, the purchaser is not liable to the seller's creditors in a direct action at law, and their only remedy is an action of attachment or garnishment. (p. 975.)

M. K. Snell and B. M. Snell, for the appellants.

Ellis & Fletcher, for the respondent.

*** RUDKIN, J. Between the eighth day of February, 1902, and the thirteenth day of September, 1902, one Kennedy was engaged in the retail liquor business, at the town of Hoquiam, in this state. During that period he became indebted to the plaintiff in this action in the sum of four hundred and seven dollars and five cents, on account of the purchase price of merchandise, to be used in the conduct of his business. On said thirteenth day of September, 1902, and while said Kennedy was so indebted to this plaintiff for such merchandise, he sold substantially his entire business and stock in trade, in bulk, to defendant in this action. The defendant did not demand

or receive from, Kennedy any statement containing the names and addresses of his creditors, or in any manner comply with the provisions of the act of March 16, 1901 (Laws 1901, p. 222), commonly known as "the sale in bulk act." The defendant paid Kennedy the entire purchase price of three thousand two hundred dollars, and continued the business in which Kennedy had previously been engaged until the twenty-sixth day of January, 1903, when he sold out to one Heffron. No action was ever instituted against Kennedy to recover the amount of this indebtedness, and this defendant never assumed or promised to pay the same. A demurrer was interposed to the complaint in the court below, for want of sufficient facts, but the same was overruled. At the trial, the plaintiff recovered a judgment, according to the prayer of the complaint, and the defendant appeals therefrom.

The sole question presented on this appeal is this: Can a creditor of a vendor who sells property in bulk, without a compliance with the above-mentioned act, maintain a direct action at law against the purchaser, to recover the amount of his debt? We think that he cannot. The only ⁶⁸¹ effect of a failure to comply with the requirements of the act, so far as the purchaser is concerned, is to render the sale fraudulent and void. It does not differ from any other transfer made in fraud of creditors, except in the matter of the proof of the fraud. It gives the creditor no direct remedy against the purchaser, either in terms or by implication. It is true that the statute was passed for the protection of creditors; but so was the statute of Elizabeth, which declares the common law on the subject of fraudulent conveyances; so was section 4575 of Ballinger's Code, declaring conveyances, in trust for the use of the person making the same, void; so was section 4578, of Ballinger's Code, declaring bills of sale, not recorded, void, where the property is left in the possession of the vendor; and so with other acts that might be enumerated. But in none of these cases, so far as we are advised, has it been held that a simple contract creditor, without judgment or lien, could maintain a direct action at law against the fraudulent grantee to recover his debt.

"If a fraudulent disposition has actually been made by the debtor of his property, a creditor cannot, in the absence of special legislation, bring an action in assumpsit against those who combined and colluded with him. Assumpsit will not lie: there is neither an express promise nor a privity from which the law will imply a promise to pay the debt of the creditor":

Bump on Fraudulent Conveyances, sec. 527. The same author says, in section 528, that an action on the case will not lie. To the same effect see **Wait on Fraudulent Conveyances and Creditors' Bills, sec. 62.**

"A creditor of one who has made fraudulent conveyances of his property cannot recover the amount of his debt by an action of assumpsit against the fraudulent creditor": 14 Am. & Eng. Ency. of Law, 2d ed., p. 351. ⁶⁸² Nor will trespass on the case lie: 14 Am. & Eng. Ency. of Law, 2d ed., p. 351. In *Adler v. Fenton*, 24 How. 407, 16 L. ed. 696, after a review of the authorities, the supreme court of the United States says: "In the absence of special legislation, we may safely affirm that a general creditor cannot bring an action on the case against his debtor, or against those combining and colluding with him to make dispositions of his property, although the object of these dispositions be to hinder, delay and defraud creditors."

It seems to be firmly established that the only remedy which the law affords a creditor against a fraudulent transfer of property by his debtor is to sue his debtor, and reach the property fraudulently transferred by attachment or garnishment. These remedies would seem to be adequate in all cases where the subject of the transfer is tangible personal property. The remedy in equity is equally well defined.

"A fraudulent transfer is valid against all persons except those who proceed to appropriate the property by due course of law to the satisfaction of the grantor's debts. As it is valid against a simple contract creditor, such creditor cannot ask the aid of a court of equity to set aside the transfer, for it does not interfere with his rights. Equity has jurisdiction of fraud, but it does not collect debts. A creditor must establish his demand at law, and obtain a lien upon the property before the transfer interferes with his rights or he has any title to claim relief in equity. No creditor can be said to be delayed, hindered or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance": **Bump on Fraudulent Conveyances, sec. 535.**

Again: "The second prerequisite of equitable relief is that the creditor shall obtain a lien by judicial process upon the property conveyed, for it is well settled that in the absence ⁶⁸³ of statute a creditor who has not in some way acquired a right to have satisfaction out of his debtor's property specifically, cannot come into a court of equity to impeach at

conveyance made by his debtor on the ground of fraud": 14 Am. & Eng. Ency. of Law, p. 324.

The only conflict of authority on any of the propositions above announced is, whether one can proceed in equity upon a mere lien by attachment or otherwise, or whether he must first obtain a judgment at law against the fraudulent grantor. Unless, therefore, a transfer, declared fraudulent and void by the act in question, differs from other transfers declared void by other acts, or by the principles of the common law, this action cannot be maintained. We can discover no logical distinction between the different classes of conveyances which the common and statutory law declare fraudulent. The remedy afforded an injured creditor must, upon principle, be the same in all cases unless the legislature has provided a different remedy. This, in our opinion, the legislature has not accomplished by the act in question. The demurrer to the complaint should have been sustained.

For this error, the judgment of the court below is reversed, with instructions to dismiss the action.

Mount, C. J., and Fullerton, Hadley and Dunbar, JJ., concur.

One Who Buys a Stock of Goods in bulk without complying with the statute requiring him to demand a list of the seller's creditors, and to see that the purchase money is applied to their payment, holds the goods as a trustee for them, and is liable to them in garnishment, although he is not indebted to the seller and has disposed of the goods: Kohn v. Fishbach, 36 Wash. 69, ante, p. 941, and see the note therein.

CASES

IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA.

TIBBS v. ZIRKLE.

[55 W. Va. 49, 46 S. E. 761.]]

OPTION.—A Power of Attorney to Sell Land does not authorize the execution of an option. (p. 980.)

OPTION.—If, Under a Power of Attorney to Sell, an agent executes an option, his principal and his coagent are not bound thereby; and if the latter purchases the land, he does not hold it as trustee for the claimant under the option. (pp. 980, 981.)

AN OPTION Given Under a Power of Attorney which does not authorize the option binds the agent whose land is included therein. (p. 982.)

OPTION—Revocation.—An Option to Buy Land, given for a money consideration, cannot be revoked during the time limited. (p. 982.)

OPTION—Bona Fide Purchaser.—One who takes an option on land, but does not pay the purchase money, is not a holder for value without notice. (p. 982.)

Ice & Ice and W. S. Meredith, for the appellant.

W. T. George and E. D. Talbott, for the appellees.

³⁰ **DENT, J.** This is a suit for specific performance instituted in the circuit court of Barbour county by R. B. Tibbs, plaintiff, against A. D. Zirkle et al., in which the circuit court decreed specific performance against A. D. Zirkle individually, but refused it against N. G. Keim and the other defendants. The plaintiff appeals.

The suit is founded on the following optional contract:

"This agreement witnesseth: That A. D. Zirkle, attorney, in fact party of the first part, for and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, do hereby sell and convey to R. C. Dunnington & Co., party of the second part, heirs and assigns, the right to purchase all the coal except from one to three acres of each of the sixteen farms hereby represented in and under that certain tract of land

Valley District, Barbour County, W. Va., bounded by lands of N. T. Arnold, on East, North by P. Monahan and O'Brien tract, on West by Middle Fork River, on the South by Middle Fork River and N. T. Arnold and containing eighteen hundred ⁵¹ acres, more or less, together with the right to mine and remove every part of the same without being required to provide for the support of overlying strata or surface, and without being liable for any injury to the same or to anything therein or thereon by reason thereof and with all reasonable privileges for ventilating, pumping and draining the mines, together with the free and uninterrupted right of way into and through said lands and to build, keep and maintain roads and ways in and through said mines forever, for the transportation of said coal, etc., and of coal and other things necessary for mining purposes from and to other lands.

"For which the parties of the second part, their heirs or assigns, shall pay eighteen dollars per acre for each and every acre of coal, no allowance being made for out crop as follows: Eighteen hundred dollars within sixty days after this date, the balance on or before the 3d day of May, 1903, and it is agreed that said second party shall pay expenses of survey, abstracting of titles, etc., and further, the party of the first part reserves the right to bore through said coal for oil and gas and to market same with being liable for damage.

"A good deed, clear of all encumbrances, with a general warranty to be made to said second parties, heirs or assigns when so notified by said second party.

"It is expressly understood and agreed that if the said coal is not accepted and paid for by the party of the second part, heirs or assigns, on or before the 3d day of May, 1903, this agreement may be considered rescinded and neither party shall be bound thereby. And it is agreed that if the said 1800 dollars is not paid on or before the 3d day of March, 1903, this contract is null and void, further, if said payment is made and the balance \$17.00 dollars per acre not paid on or before the 3d day of May, 1903, this contract is null and void and said payment is a forfeiture.

"In witness whereof, the said parties have hereto set their hands and seals this 3d day of January, A. D. 1903.

"Signed, sealed and delivered in the presence of

"A. D. ZIRKLE,

"Attorney in Fact. [L. S.]

Attest: C. MORRIS."

This option was assigned to the plaintiff, who claims he fully conformed to all the stipulations thereof. The option is ⁵² claimed to have been executed by virtue of the following power of attorney:

"Be it remembered that we, the undersigned, hereby appoint A. D. Zirkle to sell our coal, except enough for domestic use, and hereby give him power of attorney to make said sale, not to sell for less than \$15.00 per acre and give him full control of said sale, and we agree to abide by the said sale that he may make; and we further agree to let him manage the sale and have the power to make said sale as long as he thinks there is a chance to sell, and we further agree to pay the said A. D. Zirkle reasonable compensation for his time and his expense for making sale as aforesaid if he make said sale, but if he fail to make the said sale no compensation is to be paid the said A. D. Zirkle for his time and expenses except agreed upon by the majority of the undersigned, and we further agree to give him all the time necessary to make tests or opening and also not to interfere with any sale that may be pending if he thinks there is a chance to sell.

"Witness our hand this 14th day of September, 1900. Jacob Zirkle, 400 A. Patrick McGinnis, 156 A. Bridget Caughlin, 102 A. H. W. Goss, 110 A. D. T. Goss, 45 A. Lewis Zirkle, 200 A. N. Rohrbaugh, 70 A. B. F. Wiseman, 180 A. G. C. Wiseman, 20 A. Valeria Wilson, 50 A. A. B. Wilson, 150 A. M. E. Gower, 60 A. A. D. Zirkle, 100 A. J. D. Zirkle, 110 A."

The defendant Keim between the 22d of January, 1903, and the 10th of February, 1903, took options on the coal of A. D. Zirkle, Lewis Zirkle, Nathan Rohrbaugh, Henry W. Goss, A. B. Wilson, B. F. Wiseman, Anna Goss, Jacob Zirkle, Margaret E. Gowen, J. D. Zirkle, G. C. Wiseman and Valeria Wilson, and paid a down payment on the purchase money to each, which was forfeitable. None of Keim's optioners had actual notice of the plaintiff's option prior to the date of Keim's options. While Zirkle, whose deposition alone is taken in behalf of defendant Keim, testifies that Keim did not have notice of such option, he admits that there was a contract between himself and Keim at the time the option was taken by which Keim was interested in such option, and if the same matured into a sale he, Keim, was entitled to share equally with Zirkle in the profits of the sale, and about the time and just previous to the taking of the options Keim, with Zirkle's assistance, Zirkle endeavored to get the o

tioners to abandon their options, thus plainly showing that Zirkle was working in Keim's interest and no doubt with the full knowledge and approval of Keim.

So the important questions in this case are narrowed down to two: 1. Did Zirkle's power of attorney authorize him to execute the plaintiff's options? 2. Did Keim occupy such relation toward the plaintiff as prevented him from taking advantage of Zirkle's lack of authority to execute such option?

If it had been shown that Keim had done anything to ratify or approve of the Zirkle option, or that Zirkle was interested in Keim's options a different case would have been presented. But there is no evidence other than suspicious circumstances directly opposed by Zirkle's evidence tending to prove Zirkle's interest in Keim's options, while the fact that Keim took these options shows that he did not approve or ratify Zirkle's option. If Zirkle had authority under his power of attorney to execute the option, Keim under his contract with Zirkle by which he was to have an equal interest in such power of attorney, would have been equally bound with Zirkle by such option as they would have been mutually interested therein. But if Zirkle exceeded his authority in the execution of such option then Keim would be no more bound thereby than the land owners, and this could only be by ratification thereof. The land owners stand indifferent in this suit, and their failure to answer the bill and deny its allegations might be deemed a willingness on their part to ratify the plaintiff's option, but this they could not do without Keim's consent after the execution of his options. We cannot hold otherwise than that Zirkle exceeded his authority under his power of attorney in executing plaintiff's option, for he was only authorized to make sale, while an option is not a sale, although it may eventuate in a sale. For the time being it prevents a sale, it matters not what the event thereof may be, and if Zirkle had authority to give an option for three months, he had the right to extend such option for three years, and in this manner he might indefinitely tie up the property and prevent instead of securing a sale thereof. This certainly was not had in view by the land owners when they authorized Zirkle to make sale for them. Those dealing with Zirkle must take notice of the extent⁵⁴ of his power: 1 Am. & Eng. Ency. of Law, 2d ed., 1010; Field v. Small, 17 Colo. 386, 30 Pac. 1034; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339.

Zirkle's option being without authority, neither Keim nor the land owners were bound by it and without waiting to see whether

it would result in a sale, they had the right to repudiate it and enter into any other arrangement either between themselves or others for the option or sale of their coal. Keim held no confidential relations whatever toward the plaintiff in so far as the unauthorized option was concerned. It would have been otherwise had Zirkle made a sale instead of giving an option, as Keim would have been bound thereby by reason of his contract with Zirkle. Keim was in no sense the agent of the plaintiff and was under no obligation of duty toward him. Keim was not bound to ratify Zirkle's option nor await its consummation. The option gave plaintiff no vested interest in the land, but was a mere right to purchase within a limited time, binding only upon Zirkle. Keim was not in duty bound to make it good: 1 Perry on Trust, sec. 206, p. 301; Farley v. Kitson, 27 Minn. 102, 105, 6 N. W. 450, 7 N. W. 267.

The plaintiff not being entitled to be substituted to Zirkle's rights under his power of attorney since his "option" was in violation thereof, he is not entitled to be substituted to any of the rights that Zirkle might have by virtue of his contract with Keim. The option is not binding on Keim and could not be made so by substitution so as to make Keim plaintiff's agent or trustee in taking his options. The power of attorney was binding on Keim, and he had no right to take options for his own benefit without Zirkle's assent, but as plaintiff is not entitled to enforce such power of attorney against the land owners he cannot enforce it against Keim.

Keim's agency grew out of and is controlled by the power of attorney. Plaintiff's rights grow out of and are controlled by his option, and he acquired no vested rights under the power of attorney that can be affected by Keim's purchasing in disregard thereof. Zirkle was under obligation to and no doubt could have prevented the revocation of his power of attorney for the time limited in his option, but he had no legal right to compel such extension, and his acquiescence in the revocation thereof imposes no binding legal duty on either Keim or the land owners to the plaintiff. Zirkle's breach of duty to the plaintiff, though ^{as} fraudulent, imposes no legal duty on those who are not participants in such fraud. Plaintiff's rights are wholly limited to his option which imposes neither express nor implied legal obligation upon Keim. Hence Keim has committed no breach of legal duty he owes to the plaintiff except in taking an option on A. D. Zirkle's one hundred acres of coal. The circuit court so decreed, but instead of canceling Keim's option as a cloud on

plaintiff's title or reserving the right to do so, it finally and completely dismissed the bill as to Keim, thus refusing complete relief between the parties: *Hotchkiss v. Fitzgerald Plaster Co.*, 41 W. Va. 357, 23 S. E. 576. While the land owners and Keim were not bound by the option, Zirkle is, for he received a money consideration therefor, and he could not revoke it during the time limited. The law is otherwise if he had received no consideration: 21 Am. & Eng. Ency. of Law, 2d ed., 929; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

The plaintiff complied with the terms of the option and tendered Zirkle the sum of eighteen hundred dollars, the full cash value of his one hundred acres of coal. As to him the court did not err in decreeing specific performance. The court did, however, err in dismissing the bill as to defendant Keim, as he held a recorded option on A. D. Zirkle's coal, and as he has not paid the purchase money; he could in no event be treated as an innocent holder for value without notice: *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644. His option should therefore be canceled as a cloud on plaintiff's title if the plaintiff elects to take the Zirkle coal.

The decree will therefore be reversed in so far as it dismisses the bill as to defendant Keim and in all other respects affirmed, and the cause is remanded to the circuit court for further proceedings according to the rules and principles governing courts of equity. The reversal is at the costs of the defendants A. D. Zirkle and N. G. Keim.

A Power of Attorney to sell land does not authorize an exchange (*Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611), nor a mortgage: *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927. Powers of attorney are generally construed strictly: *Campbell v. Foster Home Assn.*, 163 Pa. St. 609, 43 Am. St. Rep. 818; *Peafold v. Warner*, 96 Mich. 179, 35 Am. St. Rep. 591; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 26 Am. St. Rep. 831. But see *Muth v. Goddard*, 28 Mont. 237, 98 Am. St. Rep. 553, and authorities cited in the cross-reference note thereto.

A Naked Option to Buy Lands is not an interest therein which a purchaser for value is bound to notice, or which equity will regard: *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894. See, too, *Gustin v. Union School Dist.*, 94 Mich. 502, 34 Am. St. Rep. 361; *People's Ice Co. v. Spencer*, 156 Pa. St. 85, 36 Am. St. Rep. 22.

An Option to Buy Land, given for a good consideration, cannot be withdrawn before the time specified for its continuance: *Mueller v. Hartmann*, 116 Wis. 468, 96 Am. St. Rep. 997; *Ross v. Parks*, 93 Ala. 4, 30 Am. St. Rep. 47.

TYREE v. VIRGINIA INSURANCE COMPANY.

[55 W. Va. 63, 46 S. E. 706.]

FIRE INSURANCE—Insurable Interest.—A husband has no insurable interest in a house which he builds at his own expense and lives in with his wife on land which is her separate estate. (p. 864.)

FIRE INSURANCE—Ownership of Property.—An insurance company has a right to insert a condition in a policy that it shall not be liable "if the title or interest of the assured is less than the entire, absolute, unconditional, unencumbered fee-simple ownership"; and if the insured has not such a title or interest, he cannot recover on the policy. (p. 987.)

Williams & Dice, for the plaintiff in error.

Gilmer & Gilmer and Preston & Wallace, for the defendants in error.

⁶⁴ BRANNON, J. Virginia Fire Insurance Company issued a policy to W. F. Tyree insuring a house and some furniture. The policy is in Tyree's name. The policy contains a clause that the company should not be liable under it "if the title or interest of assured is less than the entire, absolute, unconditional unencumbered fee simple ownership" in Tyree. The land was the separate estate of his wife. He built the house upon it at his own expense, and lived in it with his wife. When Tyree applied to the agent for insurance, Tyree says he said to the agent, "I want my house insured," but the agent did not interrogate him as to his title. There is controversy only as to the loss from destruction of the dwelling-house. The company tendered return of the premium. Tyree brought suit on the policy, recovered verdict and judgment for eighteen hundred and seventy-five dollars, of the two thousand dollars insurance on the house, and the company brought the case to this court.

A vital question is: Had Tyree an insurable interest in the dwelling-house, it being his wife's separate estate? I am perplexed upon the question. "It has become a fixed rule of insurance law that the assured must have an interest of some kind in the subject matter of insurance, whether property or life. Two reasons may be assigned for this rule. In the first place, it is inexpedient that a contract so necessary for the protection of legitimate business should be prostituted to illegal uses as a mode of speculation; and in the second place, it is opposed to public policy, because demoralizing to the insured, that he

of such insurance, however willing the parties may be to enter into it. The doctrine of waiver has obviously nothing to do with such a case. The agent cannot do for the company by waiver what it is powerless by express contract to do for itself; he cannot by waiver invest the insured with an interest he does not own. There was occasion to consider this question in *Peoria v. Hall*, 12 Mich. 202, and it was held that an insurance of partnership property by one partner in his own name could not be made to embrace the interest of the other partner, though it was written by the agent with full knowledge of the fact.^{es} The reason is the one above assigned. It is not competent to write an insurance where an insurable interest is wanting. The difficulty is inherent in the case, and is beyond the reach of waiver. It is proper to say that under our statute the husband has no control whatever over his wife's property; so that the question arises here precisely as it would had the silver been owned by a stranger." So was the decision: *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326. This holding is sustained by *Trott v. Woolwich Co.*, 83 Me. 362, 22 Atl. 245, holding that a policy issued on a dwelling in the name of the husband when title was in his wife, the company not being informed that he was not the owner, is void. The reasons are fully stated in *Clark v. Dwelling-house Ins. Co.*, 81 Me. 373, 17 Atl. 303: "The married women's acts take away from the husband all right to the possession or control of the wife's separate estate. He has no present right of enjoyment, no interest in the rents. A policy of insurance secured thereon by the husband who has no insurable interest therein, is unenforceable. *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428, *Traders' Ins. Co. v. Baracliff*, 45 N. J. L. 543, 46 Am. Rep. 792, is to the reverse. *American Cent. Co. v. McLanahan*, 11 Kan. 533, cited to the contrary, is not so, as the policy was got by the husband as his wife's agent for the benefit of both, though in his name, and the insurer was aware of the facts. *Merritt v. Hughes*, 42 Iowa, 11, is cited on this side, but the court said the husband was by the Iowa code entitled to hold possession against his wife's will. In this state he is on her property not by binding law, but by love and sufferance—has no legal tenure. *Horsch v. Dwelling-house Ins. Co.*, 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806, is a case where the husband had the entire beneficial use and possession, had paid for the land, managed it exclusively, took exclusive control of rents and profits, and had an agreement with his wife that she would convey the land

ple ownership." An insurer has right to know the truth about ownership. It would be willing to insure the fee owner, because he would have a motive not to burn the property, but not willing to insure one not owning, for he might have a motive to burn and get the money. "If the insured states the nature or extent of his interest, he must state it truly. If the nature of the insured's interest is such that it would influence the underwriter to charge a higher premium or not insure at all, it must be disclosed, for it is material to the risk." "In cases where the misrepresentation is positive, and of a fact actually material, it is not necessary to prove that the representation was fraudulently made; the materiality of the misrepresentation and its falsity does away with the necessity of showing actual fraud": Joyce on Insurance, secs. 1858, 1897, 1894.

"A false representation as to the interest of the assured in the property is regarded as material, and such as, if substantially false, avoids the policy": Wood on Insurance, sec. 179. Chief Justice Marshall said: "Insurances against fire are made in confidence that the assured will use all precautions to avoid the calamity insured against which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk and estimating the premium. So far as it may influence him in this respect, it ought to be communicated to him": *Columbian Ins. Co. v. Lawrence*, 2 Pet. 48, 7 L. ed. 335. If the policy requires a statement of interest, it is thus made material, and must be true: 1 May on Insurance, secs. 285, 287. "When the condition requires the applicant to have the entire, unconditional and sole ownership, a policy issued to one who described the property as his frame dwelling-house, when his title was only a quit-claim deed from a second mortgage, avoids the policy under the sole ownership clause": 1 May on Insurance, 287B. "A representation may be made by express stipulation material, in the sense that inquiry into its materiality is thereby precluded, and the insured will be bound in such case, even though the fact be actually immaterial. The truth of the statements being generally made in such case the basis of the contract, it is sufficient to show they are actually untrue": Joyce on Insurance, sec. 1812. In the same section we find it said: "If a fire insurance policy is conditioned to be void 'in case of any misrepresentation whatever,' any misrepresentation, whether material or not, will avoid it." If a person does not like the conditions, he need not accept the policy. Tyree in words repr-

the wife's separate estate. He has no present right of enjoyment, and no interest in the rents and profits of his wife's real estate. He has a mere right of expectancy, the same as the heir has in his ancestor's property. If a fire destroys the improvements, he meets with no pecuniary loss any more than if the marriage relation did not exist between himself and the owner."

The supreme court of Maine, in holding that a husband has no insurable interest in property which he has conveyed in fee simple to his wife, said in *Clark v. Dwelling-house Ins. Co.*, 81 Me. 373, 17 Atl. 303: "Our statutes seem to have removed the last vestige of the common-law marital rights of a husband in the real estate of his wife, however she may have acquired it. His only rights now in real estate which he conveys to his wife are a naked veto of a conveyance by her in fee, and a possibility of taking by descent, at her decease, depending on his survivorship and her solvency. She may manage the property without the joinder or assent of her husband. She may make him her agent, or not, as she chooses. The law gives the wife the entire control of such property in every respect, except the power of conveyance in fee; and even if it be a homestead, he can occupy it only by her consent. It is subject to be taken by her creditors. A married woman is not limited in the management of her property, however obtained. She may control its income. She may lease it without her husband's assent, and her lessee may expel him from the possession. During her lifetime he has no interest, not even a right of occupancy. If he survives her, and her estate is solvent, he acquires by these events a new interest and by way of descent only. He would be no more affected by the burning of her house than he would by the burning of any house which he was merely occupying rent free, or which he might possibly inherit."

II. Where His Marital Rights are not so Abrogated.

But in those jurisdictions where the law governing the rights of husband and wife in her property has been less modified by statute, and he has the use, possession, and enjoyment of her property during their joint lives, and will be a tenant by the curtesy after her death, he is generally regarded as having an insurable interest in her property: *Franklin Marine and Fire Ins. Co. v. Drake*, 41 Ky. (2 B. Mon.) 47; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Trade Ins. Co. v. Barrachffe*, 45 N. J. L. 543, 46 Am. Rep. 792; *Harris v. New York Mut. Ins. Co.*, 50 Pa. St. 341. See, also, *Curry v. Commonwealth Ins. Co.*, 27 Mass. (10 Pick.) 535, 20 Am. Dec. 547.

III. Where the Property is a Homestead.

Although there are authorities which probably lend themselves to a contrary interpretation (*Clark v. Dwelling-house Ins. Co.*, 81 Me. 373, 17 Atl. 303; *Trott v. Mutual Fire Ins. Co.*, 83 Me. 362, 22 Atl. 245; *Glaze v. Three Rivers etc. Ins. Co.*, 87 Mich. 349, 49 N. W.

See the principal case, *supra*, p. 383. There are others holding that a man has an insurable interest in a house situated on his wife's separate estate and occupied by them as a homestead. This is held to be the law in *Marston v. Farmers' Ins. Co.*, 41 Iowa, 11. In that case the house was erected by the wife before marriage on land in which she held a life estate through her husband afterward made improvements and additions to the building. Said the court: "The plaintiff had a homestead interest in the property, and was entitled to security independent of the will of his wife. This right could be terminated only by her death. Whatever benefits flowed from such security he enjoyed on account of his interest in the property, and he could not be deprived of them except by his own act. The destruction of the house deprived him of those benefits growing out of his interest in the property. His interest then is clearly within the definition of an insurable interest."

In a recent Texas case it is decided that a man has an insurable interest in property owned by his wife and her children by a former husband and occupied by them as a homestead. "It appears from the evidence," said the court, "that the property insured and destroyed was the property of the wife of plaintiff and her minor children by a former husband, and that at the time of the insurance and the time of the destruction it was the homestead of the plaintiff and his wife. He was in the actual use and possession of the property, enjoying it as a home, and this right of possession, use, and enjoyment would continue for some length of time as he and his wife would desire to use the property for that purpose. It might be for the life of either of them. The right of use and possession was a valuable one, which attached to the house and improvements located upon the premises and gave the husband such an interest as he could protect by insurance." *Continental Fire Assn. v. Wingfield*, 32 Tex. Civ. App. 144, 7 S. W. 447. See, too, *Reynolds v. Iowa etc. Ins. Co.*, 34 Iowa, 565, 41 N. W. 453.

Where a husband erects a dwelling on his wife's land, and with her occupies it as a mutual homestead, and as her agent effects an insurance for their mutual benefit, though in his own name, and the insurance company, aware of these facts, issues the policy and receives the premiums, he may recover on the policy in case of loss: *American Coll. Ins. Co. v. McLambert*, 21 Kan. 533.

The interest of a husband in his wife's dwelling-house, used by her as a homestead by the family, is sufficient to support a recovery for jointly in a policy issued to both: *Webster v. Dooling*, 18 Cal., 53 Cal. 2d 555, 42 N. E. 565, 31 L. R. A. 724.

IV. Where She Holds the Legal Title.

He Advanced the Purchase Money.—Where a man pur-
chased with his own funds, but the conveyance is made to
her she holds the title as a matter of convenience, he being
a, resident, and profits, and claiming an ab-

lute ownership, he has an insurable interest in the premises: *Danvers Mutual Fire Ins. Co. v. Schertz*, 95 Ill. App. 656. So, where a man purchases a farm and buildings with his own money, but by his direction the deed is made to his wife, there being an understanding between them that on request she would convey to him, and he takes the possession and beneficial use of the entire property, making improvements, cultivating the land at his own expense, using the proceeds in the support of the family, and owning the personal property on the farm, he has an insurable interest in the buildings: *Horsch v. Dwelling-house Ins. Co.*, 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806. In *Trott v. Mutual Fire Ins. Co.*, 83 Mo. 362, 22 Atl. 245, however, it is held that where a man purchases property with his own funds, and the title is taken in his wife's name with no agreement between them as to the manner in which she should hold and use the property, but he insures it in his name as his own while the family occupies it as a homestead, and they afterward move out of the state, and he dies before the property is destroyed, the policy is not enforceable.

b. Or She Agreed to Give Him a Life Estate.—Where a husband conveys property to his wife upon the consideration and under a verbal agreement that she shall reconvey to him a life estate, and he remains in possession receiving the proceeds of the property, he has an insurable interest therein, although she executes no lease or conveyance to him: *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354, 15 Am. Rep. 424. In *Jacobs v. Mutual Ins. Co.*, 52 S. C. 110, 29 S. E. 533, a man conveyed land to his wife upon the agreement that during coverture he should be allowed the use and possession of the property free of charge, and that he should pay all taxes and insurance and make all necessary repairs and improvements. It was held that under this transfer and agreement the husband had a life estate and an insurable interest in the premises. There was an agreement in this case for a reconveyance to the husband on his request, but it was held void.

V. Where He has a Lien on the Property.

In *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 461, a married woman, being indebted to her husband, gave him a written acknowledgment of the debt, "which shall be a lien on my property," and subsequently died leaving insufficient personal assets to pay her debts and but one parcel of land, valuable chiefly for the buildings on it. The court held that the husband had an insurable interest in the buildings.

VI. Where the Property is Personalty.

According to some authorities, a husband does not have an insurable interest in his wife's personal property. This is the view taken in *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326, where the property in question was silverware. It do

not appear, however, whether he had any possession or use of the property. In *Mercantile Ins. Co. v. Orphan Boy*, 3 Cin. Law Bull. 593, Fed. Cas. No. 9431, it seems to be regarded that a man has no insurable interest in a vessel owned in part by his wife. But in *Cohn v. Virginia Fire etc. Ins. Co.*, 3 Hughes, 272, Fed. Cas. No. 2970, it is said that a husband's right of using his wife's goods is an insurable interest. And in *Clarke v. Firemen's Ins. Co.*, 9 La. 629 (18 La., O. S., 431), it is held that a policy issued to a husband on furniture belonging to his wife, and used in their dwelling, is valid. The leading case on this question is *Trade Ins. Co. v. Barrackcliff*, 45 N. J. L. 543, 46 Am. Rep. 792, where it is decided that a husband in the possession and enjoyment of the buildings and stock on a farm, the title to both the real and personal property being in his wife, has an insurable interest in both. "Of the personality," to quote from the opinion, "he had the actual possession and enjoyment, and also a reasonable expectation of the continuance of these pecuniary advantages as lawful incidents of the wife's ownership and his marital relations with her. His interest was such that even in criminal pleadings, framed to convict one of the larceny of the goods, he might be described as their owner. In the reality he had not only these same benefits, but also an inchoate right of curtesy. . . . Such present benefits, coupled with such prospective rights, come easily within the definition of an insurable interest."

VII. Where He Acts as Her Agent.

A policy of insurance taken out by a husband on the property of his wife has been thought sustainable on the ground of agency. Thus in *Harris v. York Mut. Ins. Co.*, 50 Pa. St. 341, the court said: "If there were more doubt than there is about the insurableness of the husband's interest, we think his purchase of the policy could be supported on the ground of agency for his wife. . . . Husband and wife are for many purposes agents of each other, also in respect to the conduct of his domestic affairs, and he in respect to the custody and management of her separate estate. When he has effected an insurance on houses in their joint possession, but which belong to her, the law will presume her ratification of his act, if not her precedent authority to perform it, and will support the insurance for her benefit. . . . On both grounds, that of the husband's interest by the curtesy, and that of agency for his wife, this insurance was well taken and ought to be sustained." This doctrine of the Pennsylvania case, on the question of implied agency, is quoted with recent approval in *American Cent. Ins. Co. v. McLanathan*, 11 533, 552; *Trade Ins. Co. v. Barrackcliff*, 45 N. J. L. 543, 46 Am. 92, 798.

RORER v. HOLSTON NATIONAL BUILDING AND LOAN ASSOCIATION.

[55 W. Va. 255, 46 S. E. 1018.]

USURY—Relief by Injunction.—One who executes a deed of trust to secure a usurious debt may, after conveying the land to a third person with a covenant of general warranty, maintain a bill to purge the debt of its usury and enjoin a sale of the property under the deed of trust. (p. 997.)

Anderson & Easley, for the appellant.

W. W. McClugherty, for the appellee.

²⁵⁵ **POFFENBARGER, P.** Ernest Rorer borrowed \$800 from the Holston National Building and Loan Association of Bristol, Tennessee, ²⁵⁶ on the fifteenth day of February, 1893, on eight shares of stock in said association, subscribed for by him, executing his bond for said sum of \$800 and a deed of trust upon certain real estate to secure the payment thereof. The bond contained the following condition, which conforms to the provisions of the by-laws of the association, respecting the payment of premium: "Now, if I pay promptly the monthly interest on said sum of \$800 and the monthly premium of \$4 bid by me for said loan, and the monthly payments on said shares of stock and any fines assessed under the rules of said association, and the taxes accruing on the lot of land described in the mortgage securing this obligation and the premiums necessary to keep the house on said lot insured in such sums as said association may require (not exceeding \$800) until the said stock becomes fully paid in and of the value of \$100 per share, then it is understood that, upon the surrender of said stock to said association, this note shall be deemed fully paid and canceled." Rorer paid the dues, interest, premium and other charges until April 30, 1895, amounting to \$358. In April, 1895, he conveyed the land on which the loan was secured to G. H. Wade, by deed with a covenant of general warranty, for the sum of \$2,500, of which sum Wade agreed, according to the recitals of the deed, to pay \$600 on the building association debt in monthly installments as Rorer had agreed to pay them. After having paid \$739.50 to the building and loan association, Wade ceased to make payments, and the trustee in the deed of trust advertised the land for sale to satisfy a balance

due on the loan of \$567.02. Thereupon Rorer brought this suit to enjoin the sale, charging in his bill usury in the debt and praying that it be expunged therefrom, and, on the fourth day of October, 1902, on motion of the defendant, the injunction was dissolved. The appeal is from the order of dissolution.

The bill treated the property as still owned by the plaintiff, making no mention of the sale to Wade, and the order dissolving the injunction stands upon the answer of the building association, fully proven, showing the conveyance by Rorer to Wade, in consideration of \$2,500. The deed recites that \$600 of the purchase money was to be paid to the building association and the balance to Rorer in three equal installments secured by deed of trust on the property, but the answer avers an assumption by Wade of Rorer's contract with the building association. It further appears from an exhibit filed with a deposition that Rorer has made a general assignment for the benefit of his creditors on the twenty-third day of April, 1898. The record does not show any deed of trust from Wade to Rorer, nor, if it did, is there any allegation or proof that any of the purchase money due to Rorer remains unpaid. Wade's affidavit is filed in resistance of the motion to dissolve and in it he says: "Affiant does not owe the plaintiff anything at all on account of the purchase money mentioned in said exhibit 'Deed.'"

That Rorer may maintain a bill to purge the debt of usury, if it be usurious, is undeniable, and the only question presented is, whether he can enjoin the sale. He has no title, either legal or equitable, to the property, nor any lien upon it, so far as appears from this record. Can he enjoin the sale of another man's property for the satisfaction of an usurious debt? No authority for or against such a proceeding has been furnished or found. It is urged, however, that as the plaintiff will be liable to Wade for any sum which he may be compelled to pay on account of this debt, in excess of the \$600 which he agreed to pay on it, he ought to be permitted to prevent the sale. But his liability to refund is not an interest or estate in the property, the sale of which is threatened, and he has his remedy against the building association to recover any usurious interest which may be compelled to pay. This court held in *Jackson v. 34 W. Va. 207, 12 S. E. 484*, that: "As a general rule, one cannot maintain a suit to remove a cloud or a bill qui tollit when he has no other interest than the fact that he has sold property with a general warranty: but in a case of silence as to title, or the party's interest would

result in the perfecting of an adverse title, he is not bound to lie by, but may bring his bill of *quia timet*." But this case is not within the rule. There a stranger set up, or threatened to assert, an adverse title with which the warrantor had no connection whatever, and which emanated from no act of his. Here the thing sought to be removed is not a cloud having the semblance of a strange and adverse title, but an encumbrance on the land by act of the warrantor which he has the right, and which it is his duty, to remove, and for which, in case he fails to do it, he must respond in damages to the extent of any excess over the agree ²⁵⁸ amount, which his warrantee may be compelled to pay. Though he has no title to the land, nor any sort of claim upon it, there is a liability upon him in respect to it, which arises out of two acts of his own, the execution of the deed of trust to secure the usurious debt, and the subsequent conveyance to Wade, and from which he can only relieve himself by paying the debt or demonstrating its invalidity or nonexistence. That he seeks to do by this bill. Should he prosecute it to a finality and obtain an adjudication that the debt has been fully paid, before any sale under the deed of trust, can it be possible that the building association could then sell the land, or that, in the event of an attempt to do so, Wade could not enjoin the sale by proving the adjudication made upon Rorer's bill? That he could do so is too plain and just to call for argumentative support. Having the right to pay the debt, and obviously the incidental right to have the amount of it settled before payment, and the aid of a court of equity to that end in the manner invoked by this bill, namely, by purgation of the usury from the debt, all independently of his grantee, it is manifestly just to allow him to prevent an attempt to sell the property and cast upon him, in advance and anticipation of the settlement, the very liability from which he seeks to escape, and ought to be relieved, according to the allegations of his bill. It is only in respect to the land conveyed that any liability can be fixed upon the plaintiff, and the only mode of fixing it is by compulsory payment of the usurious debt, and the only method of compelling it is actual or threatened sale under the deed of trust. By enjoining the sale, therefore, the plaintiff interferes with the alleged right of no person except the creditor, and he must either enjoin or permit the usurious interest to be collected, and that from himself, not directly, but indirectly.

The jurisdiction for injunction does not necessarily rest upon irreparable injury to result from the sale of the land, how-

ever. Equity has properly taken jurisdiction of the controversy between Rorer and the building association, and, having taken jurisdiction of it, neither party would be permitted to resort to another form for the determination of any matter involved in that controversy. A resort to a court of law by the building association for any action which would interfere with or obstruct full and complete administration of the equity jurisdiction of the ²⁵⁹ subject matter would be promptly enjoined, and obedience to the injunction enforced by attachment for contempt if necessary: *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 153. A sale under the deed of trust, pending the suit to purge the debt of its usury, though not a resort to another forum, is a proceeding in pais which would have all the effect of judgment and execution in another court. As shown by the foregoing observations, it would virtually nullify and defeat, by way of anticipation, the relief sought by the plaintiff in his bill. Without the aid of the injunction, he would be without any remedy at all to prevent the fixing upon him by the building association of a liability in favor of Wade, although not irreparable injury in the ordinary sense of those terms, for the injury might be compensable in damages. But it is clearly a case of want of adequate remedy at law, as regards the fixing of this liability.

The case assimilates itself, also, to that of an injunction to prevent the transfer, before maturity, of negotiable instruments fraudulently acquired. In such case the injury would not be irreparable any more than in this case, perhaps, as the injured party might have his action at law against the payee after having satisfied the notes in the hands of an innocent purchaser for value. But he is without remedy at law to prevent the use of the notes to fix upon him a liability which has no just or legal foundation. Therefore, he is allowed to enjoin the transfer and cause the notes to be delivered up and canceled: *Dickinson v. Bankers' Loan etc. Co.*, 93 Va. 498, 25 S. E. 548; *Devries v. Shumate*, 53 Md. 211; *Hullhorst v. Scharner*, 15 Neb. 57, 17 N. W. 259; *Jervis v. White*, 7 Ves. Jr. 413; *Brumley v. Holland*, 7 Ves. Jr. 20. The settlement of this controversy between the plaintiff and defendant, if the case made by the bill shall be sustained, will put it beyond the power of the defendant to make sale of the land under the deed of trust, for, if the debt be paid, as the bill alleges, then the court, by its final decree, will order a release of the deed of trust. These views that the effect of one man's enjoining the sale of

another's land is merely incidental to the exercise of the plaintiff's right to invoke the aid of equity jurisdiction and not the foundation of the right itself. In one aspect of the case the injunction is a mere process in aid of the court's jurisdiction to give full relief in the main ²⁰⁰ cause. In another, it is a writ to which the plaintiff is entitled on the ground of want of any other adequate remedy.

Though Wade might properly have joined in the prayer for the injunction in view of his ownership of the property, or could have been made a defendant, he had no direct interest in the real controversy between Rorer and the building association, and it is not perceived that he is a necessary party to the bill for the preliminary injunction. In *Harper v. Middle States Loan etc. Co.*, 55 W. Va. 149, 46 S. E. 817, decided at this term, the owner of the property, encumbered by a similar deed of trust, filed a bill for injunction, making the debtor a defendant along with the trust creditor, and the debtor, by her answer, joined in the prayer of the bill and averred an assignment of her claim for usury to the plaintiff, and this court affirmed a decree, expunging the usury, prohibiting the sale and giving a recovery of money paid in excess of the debt. But the facts in the case were different from those we have here. Wade claims to have paid the association all he agreed to pay, and, on his theory, there is no necessity for any action on the part of the plaintiff to prevent him from paying over on the usurious debt anything left in his hands for the purpose, as in the case above cited. The answer alleges an assumption on his part of the plaintiff's entire contract with the building association, but there is a right of retraction in the plaintiff as to this. As he may recover the money back after payment, he may prohibit the payment. If, however, Wade should be bound by the final decree so as to settle the rights of all parties interested, which would accord with the general rule that all persons interested in the subject matter should be parties to a suit in equity, as well as the principle of giving full relief when jurisdiction attaches for one purpose, the failure to make him a party in the first instance was insufficient ground for dissolving the injunction, under the circumstances of the case. It is not too late, however, to bring him in for that purpose at the instance of either party.

Upon the foregoing views, the conclusion is that the court should have overruled the motion to dissolve, and retained the injunction until final hearing, causing all proper amendments

to be made as to parties or otherwise. The order appealed from will, therefore, be reversed and set aside, the injunction reinstated, and the cause remanded for further proceedings.

Usury is as much matter of affirmative relief as it is a ground of defense: *Vandergrif v. Swinney*, 158 Mo. 527, 81 Am. St. Rep. 325. As a rule, courts of equity will give any relief against a usurious transaction to which the borrower may be entitled: See the monographic note to *Davis v. Garr*, 55 Am. Dec. 400.

ROWAN v. HULL

[55 W. Va. 335, 47 S. E. 92.]

AGENCY—Power not Coupled with Interest.—The commission to be earned by an agent to sell land is not such an interest as renders his authority irrevocable. (p. 999.)

AGENCY—Revocation.—An Agency for a Definite Period to sell land may be revoked at will by the principal, but for a wrongful revocation within such period he will be answerable to the agent in damages. (p. 1000.)

AGENCY—Contract of, not Signed by Agent.—A written proposition to employ one as agent to sell land, signed by the proposer and accepted but not signed by the agent, makes a binding contract of agency. (p. 1001.)

CONTRACT—Consideration.—Benefit to be Derived on each side from a contract fulfills the demand of the law as to consideration. (p. 1002.)

CONTRACT—Consideration.—Where Mutual Promises are made, the one furnishes sufficient consideration for the other. (p. 1002.)

TRIAL—Giving Instructions Provisionally.—An instruction should not be given to the jury and their consideration of it made to depend upon whether they find that there is evidence to sustain it. It is for the court to determine whether there is evidence to render an instruction relevant. (p. 1003.)

John Osborne and J. D. Logan, for the plaintiff in error.

Rowan & Boggess, R. E. L. Clark and J. A. Meadows, for the defendants in error.

336 BRANNON, J. In the circuit court of Monroe county, an appeal from a justice, John L. Rowan & Co. recovered against J. W. Hull, a verdict and judgment for one hundred thirty-seven dollars and fifty cents, and from this judgment has brought a writ of error. The claim of Rowan & Co. that Hull engaged them to sell for him a tract of land, and

they ³³⁷ undertook the service, and made effort to sell to several persons; that they interested John C. Ballard in the lands and sent him to see it, but Hull informed Ballard that he had concluded not to sell, and had revoked the power of Rowan & Co. to sell. Ballard then went to Rowan & Co., and they exhibited to him the written memorandum empowering them to sell, and convinced him that they still had power to sell under it, notwithstanding the revocation of their authority to sell, and then Ballard made a writing addressed to Rowan & Co. saying that he would give them five thousand five hundred dollars for the Hull farm. Before Ballard went to see the land, Hull wrote Rowan & Co. on the 12th of August that he had concluded not to sell his farm. The memorandum putting the land in the hands of Rowan & Co. for sale is as follows: "Three hundred acres in Sweet Springs Dist. near Gap Mills; good dwelling, fine barn and other buildings; fine orchard, well watered with running water—well timbered—one of the nicest farms in Monroe. Price, five thousand five hundred dollars. Terms easy. Five per cent to John L. Rowan & Co. Land to be exclusively with them three months and until withdrawn. This August 5th, 1902, J. W. Hull."

On 5th of January, 1903, Rowan & Co. sued Hull for compensation for their service under this agreement.

Hull contends that the paper given by him conferred on Rowan & Co. a naked power to sell, uncoupled with an interest, and that it was revocable at any moment he might choose to revoke it, and that when he revoked it before sale Rowan & Co. could not recover the agreed commission, but only, at most, compensation for what they actually did, if anything, under the power. Hull would reverse the judgment on the strength of his revocation of the authority of Rowan & Co. to sell. The summons not being before us, and no pleading to show whether Rowan & Co. claimed five per cent on five thousand five hundred dollars, or merely actual compensation for trouble as agents, we cannot say, by the record, which character of claim was made; but we assume that it was for commission. What is the effect of the revocation before Rowan & Co. found a purchaser? We have the question strictly as between those parties, not the rights of Ballard. This power was naked, coupled with no interest, as the commission to be earned is not an interest, rendering the power irrevocable: 1 Am. & Eng. Ency. of Law, 2d ed., 1217; Mechem on Agency, sec. 207. The same book, section 209, says: "Power to revoke—how distinguished from ³³⁸ the right

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agent a debt, and it was held irrevocable in life or by death. By no means does it touch the proposition that where one empowers another for a given time, the power can be recalled sooner without liability. We do not deny that even if the power says it is exclusive or irrevocable, it may be revoked, unless coupled with an interest or for a fixed term: *Mechem on Agency*, sec. 204. But here is a fixed term.

The right of action of *Rowan & Co.* thus being clear, what is the measure of recovery? Hull says that they have right to recover for what service they performed, but that the recovery is beyond that. Even on that basis we do not see that we can deny the finding of the jury. But that is not the test. "Where the parties have provided by their agreement what the agent's compensation shall be in case the principal sees fit to revoke the authority prematurely, such agreement will form the basis of the agent's recovery": *Reinhard on Agency*, sec. 269; *Mechem on Agency*, sec. 622. Under this principle the jury could have given *Rowan & Co.* two hundred and seventy-five dollars, and so Hull has no right to complain of a less verdict. They could have realized that sum had not the agency been terminated: See *Ferreira v. Sayres*, 5 *Watts & S.* 210, 40 *Am. Dec.* 496.

But Hull says further that the memorandum is one-sided, imposing no duty or liability on *Rowan & Co.*, and not binding them because they did not sign it. A writing was not necessary on their part to create an agency. If they accepted the agency that was enough: *Reynolds v. Tompkins*, 23 *W. Va.* 229; *Mechem on Agency*, sec. 271. If a principal employ the agent for pay for executing the agency, it is enough: *Reinhard on Agency*, sec. 62. The oral evidence proves that they did accept the agency. That evidence does not contradict or vary, but supplements and applies the short memorandum and explains the contract as consistent with it. Indeed, no oral evidence is for that necessary. Of course, oral evidence is permissible to show acceptance of the agency, as it is to show acceptance of a deed. *Rowan & Co.* went on to execute the agency by seeking purchasers under it, and this signifies acceptance. "This consent, of course, may be inferred from the acts of the agent. Thus, where he is found performing the agency, his acceptance ³⁴⁰ of it will be presumed": *Mechem on Agency*, sec. 108. *Rowan & Co.* accepted the memorandum. Offer on one side accepted by the other makes a mutual contract binding on both: *Bishop on Contracts*, sec. 322. The consideration is

valid in law; the promise on the one side to employ, the agreement on the other side to be employed signified by the delivery of the memorandum and its acceptance and prosecution of the agency under it. There were mutual and dependent promises on the one side to employ, on the other to serve. In the forms of declaration touching services we find them saying that in consideration that one agreed and undertook to employ, the other agreed and undertook to serve in a given capacity. These are mutual promises. It is surely not true that Rowan & Co. were bound to do nothing. When they accepted that memorandum of that employment, they became liable to the duties imposed upon them by law in such cases. For breach of their duty, for negligent loss of a sale, they would be liable: 3 Minor's Institutes, 329. There was benefit to be derived on each side from the contract, and that fills in the fullest the demand of the law as to consideration: *Sturn v. Parish*, 1 W. Va. 125. "Where mutual promises are made, the one furnishes sufficient consideration for the other": 9 Cyc. 323. Bilateral contracts furnish both the required consideration and mutuality: 6 Am. & Eng. Ency. of Law, 2d ed., 727. This case is but an instance of the old basic rule of the law of contract that where an offer is made and accepted a contract has been made.

Hull says that plaintiff's instruction 3 is bad. It says that the consideration for a contract need not be money, but may be of an act to be performed, and if plaintiffs agree to sell for remuneration, that is sufficient consideration. This is sound. But it is said that it conflicts with defendant's instruction first saying that when Hull put his land into the hands of Rowan & Co. he could revoke at any time. Where is the conflict when one deals alone with consideration, the other with revocation? There is no inconsistency between instructions 3 and 4, the latter saying that if Rowan & Co. found a purchaser and consummation of sale was prevented by defendant, they could recover commission. They deal with different subjects.

Fault is found with plaintiff's instruction 5. After stating a proposition, the court stated to the jury that the instruction was 341 to be considered, if evidence had been given to sustain it, but if no such evidence had been given the jury must disregard it. It is very old law that an instruction should not be given without evidence bearing upon the facts on which it is based, and whether there is such evidence the court must say so. This is not a new rule, for to give an instruction contrary to the facts is innumerable for the cause.

that there was no evidence to render an instruction a question before the jury. When the court gives an instruction, the jury must say that in the opinion of the court the subject of the instruction is a proper matter for the consideration of the jury under the evidence. Though error to give the instruction, it ought not to reverse the judgment. The instruction runs that if Rowan & Co. got Ballard to view the land with a view to buy, and Rowan & Co. did this before revocation and afterward Ballard made an offer to buy at the price fixed in the memorandum, and did so in pursuance of the solicitation of Rowan & Co., then they were entitled to recover the commission stipulated in the contract. It was claimed on the one side and denied on the other that when Rowan was on the witness-stand he stated that a few days after the engagement of Rowan & Co. as agents and before the 12th of August, the date of revocation of their authority, Rowan talked with Ballard and Mann about the land, and they agreed to examine it. The judge was sitting with his back to the witness and could not certify that the witness had so stated, and therefore left it to the jury to say whether he had so stated. Now, the date when Rowan talked with Ballard and Mann and requested them to examine the land is immaterial, so it was within three months. That evidence, the existence of which was left to the jury, was immaterial. That statement of the instruction was hurtful to the plaintiff and beneficial to the defendant. Eliminate it, and the instruction is sound law and pertinent to the case.

Our conclusion is to affirm the judgment.

A Broker employed to procure a purchaser of real estate may ordinarily be dismissed by his principal at any time before a customer is found: *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397. But if the employment is for definite period, a dismissal without cause before the expiration of the time specified renders the principal answerable as for a breach of the agreement: *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695.

WOODS v. COTTRELL.

[55 W. Va. 476, 47 S. E. 275.]

PROHIBITION Lies Only Where There is Usurpation and abuse of power, when an inferior court has not jurisdiction of the subject matter, or having jurisdiction, exceeds its legitimate powers. (p. 1005.)

PROHIBITION does not Lie After Judgment has been given and fully executed. (p. 1006.)

IF PROHIBITION is Asked After Judgment, it must appear that execution has not been done. (p. 1006.)

PROHIBITION Lies Only to Judicial Tribunals, and a constable or a clerk is not a judicial officer. (p. 1006.)

PROHIBITION does not Lie Where Other Plain Remedy exists. (p. 1006.)

PROHIBITION does not Lie Against a Justice of the peace who issues a warrant to arrest a person for keeping a slot machine as a gaming table, and to seize the machine. (p. 1008.)

GAMBLING APPARATUS—Seizure and Destruction.—A statute authorizing the seizure of gaming tables, and their destruction after the conviction of the owner, is not unconstitutional as depriving him of property without due process of law. (p. 1008.)

GAMBLING APPARATUS—Destruction of.—When gaming tables are seized under the West Virginia statutes, it is only the trial court after conviction that can order their burning; the justice cannot. (p. 1008.)

J. W. Kennedy, Cornwell & Cornwell, J. H. Holt, John Basel and M. G. Sperry, for the plaintiff in error.

S. B. Avis, prosecuting attorney, for the defendants in error.

⁴⁷⁷ **BRANNON, J.** A justice of Kanawha county issued a warrant requiring the arrest of Gibby Woods, charging that he kept and exhibited "a gaming table called an A B C table and E O table and faro bank and keno table and table of like kind under the denomination of slot machine." The warrant required the constable to arrest Woods and bring him before the justice to answer the charge, and also to seize the lot machine and any money staked and exhibited to allure persons to bet at such table or bank, and under it the constable arrested Woods and seized the slot machine, and upon hearing Woods was required to give bond for his appearance before the criminal court to answer the charge, and the slot machine was by the justice's order turned over to the clerk of the criminal court to await the action as to the machine. Two days after the justice's order Woods obtained from the circuit court a rule against the

justice, the constable and the clerk of the criminal court to appear and show cause why writ of prohibition should not go to prohibit them from proceeding upon the said order of the justice, "and commanding them no further to hold said slot machine from said petitioner." Upon hearing the court discharged the rule, and Woods sued out a writ of error from this court.

At once the question thrusts itself upon us, Does prohibition lie in this case? No one can question that a justice has jurisdiction to issue a warrant to begin a prosecution for keeping gaming tables under Code of 1899, chapter 151, section 1. Say that he erred in deciding that a slot machine is a table, an instrument ⁴⁷⁸ of gaming, under that statute; it is only an error of judgment within the pale of a lawful jurisdiction; it is not an usurpation of jurisdiction, but mere erroneous decision in a case lawfully before him. The law commanded him to consider and decide whether or not keeping a slot machine was an offense under that statute; he did only what the law required of him, he decided that question. Prohibition lies only where there is "usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers": Code, c. 110, sec. 1; *Haldeman v. Davis*, 28 W. Va. 324; *County Court v. Boreman*, 34 W. Va. 362, 12 S. E. 490. It was argued at the bar that the code just cited says that the writ lies as "matter of right." So it does in those cases where it does lie; but those words do not define the cases where it lies, but were inserted only to say that in cases proper for the writ it should be demandable of right, instead of resting in the discretion of the court, as before that enactment. For such error in mere judgment the law provides another remedy: *West v. Lawson*, 40 W. Va. 480, 21 S. E. 1019. If indicted, the criminal court, then the circuit court, then the supreme court—all in the due course of law; and this is another reason against prohibition. A bold proposition it is to say that when a justice sends out a warrant for a criminal act for which the law gives him power to issue it, a prohibition lies even where the act does not constitute an offense. Can the question whether it is an offense be tested by prohibition? It is not a criminal writ. Can the usual criminal procedure be arrested and frustrated by this writ? Surely not. To so hold would palsy the vigor of criminal process. Everybody would be asking a prohibition when a warrant is sued out against him. We decline to set such a precedent, and decide

the writ without regard to the question of the propriety of issuing the writ, and that he understood as being that prohibition can be so used, even though the parties object, as we do not think that consent can give the writ a fraction of power it is law: See *Conservancy System in State v. Godfrey*, 24 W. Va. 54, 41 S. E. 153.

ANOTHER POINT WHY THE WRIT DOES NOT GO, so far as it is to prevent the action of the justice, is, that he had already acted. When he sent Woods on to the criminal court he was ~~and~~ ⁱⁿ further official, the matter was that instant in the criminal court. "Prohibition does not lie to restrain an inferior court after the judgment has been given and fully executed": *Hallman v. State*, 25 W. Va. 154.

Next is it whether the writ can go to operate upon the machine and clerk. As to the constable: We are to presume that as the petition for prohibition was not presented until 9th December, the constable had already lost custody of the box machine. It does not appear to the reverse. Where after judgment prohibition is asked to restrain the execution, as may under some circumstances be done, it must appear that execution has not been done: but in this case it does not so appear: *City of Charleston v. Bell*, 45 W. Va. 44, 57 S. E. 152; *Williams v. State*, 24 W. Va. 412, 15 S. E. 591; *Bolley v. Archibald*, 31 W. Va. 294, 11 S. E. 592. And the constable is not a judicial officer, nor is the clerk, and prohibition is only to judicial officers.

As to clerk the plea alleges that the writ shall command him "not further to hold said box machine from the petitioner"; that is that he surrender it to Woods: it can have no other significance. It would be worthless otherwise. This makes the writ an action of *denique*, a fraction which it cannot perform. If the order of the justice were void, as it is not, or if that ~~feature~~ ^{feature} making the machine were void, it could be so held in an action of *denique*, which would be the proper process. Prohibition does not lie where other plain remedy exists. But aside from the last consideration, the statute gives authority to seize under the warrant of the justice, a gaming table or fare bank, and the power to burn it, and within this would be included the power to hold it as evidence in furtherance of the prosecution, acting with the warrant, and to answer final judgment of the court. Now, this seizure is thus under color of statutory authority and jurisdiction, not without jurisdiction, not as an abuse of jurisdiction, but within the very letter of the statute. The arrest, holding the ac-

ed to answer in court and seizure of the instrument, thus preventing its use in gaming until trial and judgment—all are under color and justification of the authority or jurisdiction given by the statute. To sustain a jurisdiction wide enough to justify not only the issue of the warrant and hold the accused to answer an indictment, but also the seizure of the slot machine, is not to assert a power in the justice to burn the machine. We do not think he has that power. This warrant is issued under a statute which does not give the justice power to hear and determine final judgment. His only power is to determine whether there is probable cause to hold the party to answer in the trial court. We cannot cut his power into separate pieces, and say that whilst he cannot try the guilt of the accused and impose punishment, yet he can pass judgment that the machine be burned. We think that whether the machine shall be burned or released depends on whether the accused is guilty. If not guilty, he is not himself to be punished, neither is the machine to be burned, and as only the trial court can determine his guilt, so only it can condemn the machine to be burned. If the party is guilty, destruction of the machine follows the ascertainment of his guilt; if acquitted, judgment of restitution to him of his property follows. Though the thing be plainly an instrument of gaming under the statute, yet if its owner be acquitted of using it for that purpose, it cannot be destroyed, as it is only instruments actually used and kept for gaming that are thus condemned to destruction.

It is argued that only after trial by a jury and conviction of the accused can the gaming table be seized. This cannot be so. It is designed to take from the accused the gaming instrument and stop its use until trial. It goes along with the accused to share his fate.

It is argued that there is no authority to turn over to the court as evidence the slot machine, and that that part of the justice's order is an excess and abuse of his power, and warrants prohibition, as the statute gives only power to burn. We have just said that the statute does not contemplate a burning by order of the justice, and this would justify the commitment of the slot machine to the custody of the criminal court to abide its order, so that it may have possession and execute its judgment of burning.

The justice had jurisdiction under the statute to decide whether there was probable cause to charge the accused. Surely that cannot be doubted. It is plain, too, that he had power

to retain the machine as evidence, and also to answer judgment of condemnation of it. The general law justifies not merely seizure of articles admissible as evidence, but even search of the person charged in order to get evidence. State necessarily rules for us: 1 Bishop on Criminal Procedure, sec. 210; Hughes on Criminal Procedure, sec. 3182. The above considerations based on only section 1, chapter 151, besides general law, to show that the justice had jurisdiction to seize and provide for the retention of the article, may be strongly supplemented by Code, chapter 155, allowing warrants to search premises to find gaming implements, as it gives power to the justice to issue search-warrants, and allows seizure, and directs that the article be safely kept by direction of the justice to be used as evidence and then in some cases burned. The law thus plainly gave the justice jurisdiction to do all he did in this case. *Boyd v. United States*, 115 U. S. 615, 6 Sup. Ct. Rep. 524, 29 L. ed. 745, is a valuable case as to limit of right of search where it is illegal or compels one to furnish evidence against himself.

Thus, we see clearly that the justice had jurisdiction. It is proposed to make the civil writ of prohibition review and reverse his action for supposed error, as if it were appellate process. Prohibition has no such office: *County Court v. Bowman*, 34 W. Va. 343, 12 S. E. 421. The case of *State v. Godfrey*, 34 W. Va. 54, 46 S. E. 185, does not conflict with this case, because the town ordinance under which the warrant issued was null, there was no jurisdiction.

It is said that the statute in authorizing the seizure and withholding of a gaming table is a violation of the constitution, as it takes property without due process. This argument goes upon the theory, in part at least, that it is the justice who commands the burning of the gaming table. It may be that if such were the construction of the statute, trial before the justice would be due process: *Central Land Co. v. Laidley*, 159 U. S. 113, 16 Sup. Ct. Rep. 80, 40 L. ed. 91. But we hold that it is only the trial court after conviction that can order such burning, and it cannot be intimated that this is not due process.

It cannot be maintained that the clause of the statute authorizing the seizure and burning a gaming table is unconstitutional. Gaming is not, at common law, an offense, but only by but keeping a gaming-house is a public nuisance by law: 14 Am. & Eng. Ency. of Law, 2d ed., 666; 1 Nuisance, sec. 45. It is law very ancient that upon an maintaining a public nuisance not only may

the offender be punished, but the nuisance may be abated as part of the judgment, and the thing with which the nuisance is done may be destroyed: 1 Am. & Eng. Ency. of Law, 2d ed., 78; 2 Wood on Nuisance, sec. 864. This is a governmental power, existing under that vast power called the "police power." It is coeval with government. Under it all criminal law finds its warrant: 1 McClain on Criminal Law, sec. 23. We cannot believe that it was the design of the state constitution or of the fourteenth amendment to the national constitution, in declaring that no one shall be deprived of property without due process of law, to enervate and emasculate government of powers so essential, and deeply rooted in the social fabric long before the adoption of American constitutions. They effect no repeal of such inherent common-law powers: In re Converse, 137 U. S. 624, 11 Sup. Ct. Rep. 193, 34 L. ed. 796; State v. Sponagle, 45 W. Va. 415, 32 S. E. 283, 43 L. ed. 727; 25 Am. & Eng. Ency. of Law, 2d ed., 146. So, the established law of public nuisance and remedy will warrant the seizure and detention and custody of the machine by the criminal court, as evidence, and to execute its judgment. In fact, this confiscation of the table is a part of the punishment, just as are the fine and imprisonment. Of course, the constitutions do not debar the legislature from fixing punishment: Bishop on Statutory Crimes, sec. 993. The old common law confiscated the felon's property. That general forfeiture of the common law, as a mere sequence of conviction, cannot be enacted in this state because of our Bill of Rights saying: "No conviction shall work corruption of blood or forfeiture of estate." This abolishes power to declare a forfeiture as a legal consequence of conviction; but it does not inhibit a provision, like that in the gaming act, forfeiting the particular thing working the mischief, the instrument of the nuisance or offense. The legislature may divest property in that particular thing. "Forfeitures of specific articles . . . are a species of fine, resting on the same principle as a sentence to pay a sum of money. We have no general practice of imposing this sort of forfeiture, but it is sometimes done under the direction of a statute": Bishop's New Criminal Law, sec. 944. The legislature may determine when that which is otherwise property shall cease to be such, if kept against law. It is subject to police power: Train v. Boston ⁴⁸³ Co., 59 Am. Rep. 113; State v. Lewis, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52; People v. Budd, 117 N. Y. 1, 15 Am. St. Rep. 460, 22 N. E. 670, 5 L. R. A. 559. In Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct.

place was a nuisance, and if so whether the person was engaged in keeping it. The court said that as the proceedings is against person and thing both, the person has due notice, and his day in court to defend against forfeiture as also to defend himself. Just so in this case: *Craig v. Werthmuller*, 78 Iowa, 598, 43 N. W. 606. Where one has his day in court and regular trial that is due process: *Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. Rep. 80, 40 L. ed. 91. Such anti-liquor laws forfeiting property have been frequently sustained: *Black on Intoxicating Liquors*, sec. 54; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Bishop on Statutory Crimes*, secs. 993, 994.

We conclude that the statute in question is valid both as to the person proceeded against and the implements used for gaming.

The question whether a slot machine is an instrument of gaming within the meaning of section 1, chapter 151 of the Code, was fully and ably argued orally and in briefs, and this court is as well prepared to decide it now as it likely ever will be, though strictly it is not proper to decide it, as prohibition does not lie. As it was stated in argument that indictments are pending in some counties against persons for keeping slot machines, and that those using them want to know whether they are violating the law or not, some of the members of the court favor expressing our opinion upon it; but some members objecting, we do not consider the question in this opinion.

We affirm the judgment discharging the rule.

Gambling Apparatus is subject to summary seizure and detention or destruction under the police power: *Board of Police Commrs. v. Wagner*, 93 Md. 182, 86 Am. St. Rep. 423; *Frost v. People*, 193 Ill. 635, 86 Am. St. Rep. 352. However, if property may be used for legal as well as for gambling purposes, it seems that the police have no authority to seize it as a preventive measure, unless it is first established that the property was procured or held for an illegal purpose: *Wagner v. Upshur*, 95 Md. 519, 93 Am. St. Rep. 412.

In *Kite v. People*, 32 Colo. 5, 74 Pac. 886, a statute providing for the summary seizure and destruction of gambling devices is upheld as constitutional. The opinion of the court reads, in part, as follows: "The specific objections now urged are, first, that the foregoing statute is unconstitutional in that it violates section 25 of article 2 of our constitution, which provides that no person shall be deprived of life, liberty or property without due process of law in the respect that no provision for a jury trial is made; and, second, that, inasmuch as this wheel might have been used for some other purpose than for gambling, and the intervener Assmussen, as the mortgagee, though leaving it in the possession of the mortgagor, was not aware of its use for an illegal purpose, and did not knowingly permit of, or give his consent to, such use, the destruction as to him is illegal.

"Since the defendant made no demand for a jury, but consented to a hearing by the judge, we might very properly hold that he cannot be heard here to say that he was deprived of the right to a jury trial. But there is a much more satisfactory way to decide the point. The right of trial by jury does not apply to this proceeding. As was said in *McInerney v. City of Denver*, 17 Col. 362, 318, 29 Pac. 516: 'Though a particular offense may have been unknown to the common or statutory law before the adoption of our constitution, yet if it clearly belongs to a class of offenses that were theretofore not triable by jury, the constitutional guaranties relating to jury trials do not apply.' Under similar statutes in other states the doctrine has been firmly established that the proceeding provided for in the foregoing section is in rem, that it is summary, and the constitutional right to a jury trial does not exist: *Glennon v. Britton*, 155 Ill. 232, 40 N. E. 594; *Frost v. People*, 193 Ill. 635, 86 Am. St. Rep. 352; *Oppenheimer v. Lalor*, 36 Misc. Rep. 546, 73 N. Y. Supp. 948; *Commercial Ins. Co. v. Scammon*, 123 Ill. 601, 14 N. E. 666; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Waple's Proceedings in Rem*, secs. 23, 24, 65, 68, 72, 112, 140, 231, 238; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 680, 38 L. ed. 385; *State and Federal Control of Persons and Property*, vol. 2, p. 826.

"In *Frost v. People*, 193 Ill. 635, 86 Am. St. Rep. 352, speaking of a statute much like ours, the court said: 'Trial by jury was never a right in summary proceedings, and the legislature did not violate the constitution by providing that gaming implements and apparatus should be destroyed, after a hearing, under the direction of the judge, justice or court.' This observation has our approval.

"The record shows that this wheel was not only used for gambling purposes, but such was the only use to which it could reasonably be devoted. It was purchased with that distinct object in view, was so used, and for no other purpose. When it was left by the mortgagee in the possession of the mortgagor, it was known that the latter might, if he saw fit, continue to use it, as he had theretofore, for the purposes inhibited by the statute. The fact that Assmussen, the mortgagee, did not expressly, or otherwise, give his consent that the mortgagor might use it for gambling purposes, and that the mortgagee did not permit, or know of, such use, is not material. According to the decided weight of authority, it is held to be the duty of the person owning or having property that might be put to illegal uses to see that it is not done: *Commonwealth v. Gaming Implements*, 155 Mass. 165, 29 N. E. 468; *Oppenheimer v. Lalor*, 36 Misc. Rep. 546, 73 N. Y. Supp. 948; *State v. Soucie's Hotel*, 95 Me. 518, 50 Atl. 709.

"In the case from Maine, the supreme court of that state, speaking by Emery, Judge, well says: 'Gambling apparatus and implements are treated by the statute as noxious per se, and they are ordered destroyed to remove a danger imminent from their very existence, not merely to punish the owner for an unlawful use. The statute by its terms strikes at the thing itself, and not at any contingent of its owner. The owner of this particular gambling apparatus did not effectually keep it harmless. It escaped from him the hurt of society. It can, therefore, be lawfully destroyed in the manner provided by statute.'

"In a recent Ohio case a statute declaring that any net or other means or device for catching fish in violation of the law for the protection to be a public nuisance, and making it the duty of certain public officers to destroy such nets and devices, is pronounced constitutional: *State v. French*, 71 Ohio St. 186, ante, p.

SLAUGHTER v. THACKER COAL AND COKE CO.

[55 W. Va. 642, 47 S. E. 247.]

MONOPOLY.—Where Three Coal Companies, engaged in developing a new coal field and mining from the same vein, organize another corporation to act as their sales agent, and contract to give the right to sell their output at a uniform price not to be departed from without the consent of all, the agent company to advertise, introduce, and sell the coal for a stipulated commission, the contract illegal as against public policy. (p. 1022.)

Simms & Enselow, for the plaintiff in error.

Campbell, Holt & Duncan and Rucker, Anderson & Hughes, for the defendant in error.

⁶⁴² **POFFENBARGER, P.** On the first day of May, 1895, there were four coal companies, corporations, operating in what is known as the Thacker coal vein in Mingo county. They were the Thacker Coal and Coke Company, the Lynn Coal and Coke Company, the Logan Consolidated Coal Company and the Maritime Coal Company. On said date another corporation was organized, called the Thacker Coal Company. Its capital stock paid in was \$640, and the principal stockholders were the presidents of the Thacker Coal and Coke Company, the Lynn Coal and Coke Company and ⁶⁴³ the Logan Consolidated Coal Company. Small amounts of stock were taken by two other persons simply for the purpose, as is supposed, of making up the required number of persons. A. Moore, president of the Thacker Coal and Coke Company, was elected president of the new company. Said new company was organized, not for the purpose of mining coal, nor of selling coal generally, but for the sole purpose of acting as sales agent of the companies operating in said Thacker vein, but the Maritime company, refused to take part in its organization and also to contract with it.

On said first day of May, 1895, said agent corporation entered into a contract with the Thacker Coal and Coke Company, whereby it agreed to sell for said company, for the period of five years, not less than twenty thousand tons of coal each year, or, in default thereof, to pay the Thacker Coal and Coke Company twenty cents per ton for so much coal as it should fail to sell, in case it did fail to sell the amount stipulated. From the proceeds the agent company was to deduct and retain as compensation ten cents per ton. The Thacker Coal and C

Company covenanted to deliver to the agent company as much coal as it could sell, not exceeding, however, eighty-four thousand tons each year. It was further agreed that if the mining company should fail to deliver coal according to the agreement, it should pay the agent company ten cents per ton for coal not delivered, as compensation or liquidated damages. It was further provided that either party might terminate the agreement at the end of any year by giving sixty days' notice prior thereto, April 1st being the beginning of the year fixed in the contract. The prices at which the coal was to be sold were fixed in the agreement, and it was further provided that they should be adhered to by the agent company unless departure therefrom should be authorized by a minute signed by all parties producing coal from said vein for whom the said agent company should act as agent. The agent company was required to account for, and pay over, the proceeds of sales on or before the fifteenth day of each month. The general nature of the agent company's business, as set forth in the contract, was the selling, advertising and introducing of Thacker coal, and it had authority to adjust and settle complaints made by consumers and to select and appoint all subagents for the sale of said coal.

Under this contract the agent company sold for the three producing ⁶⁴⁴ companies with which it had contracts, up to the first of May, 1896, 124,087 tons. In the meantime, there had been paid in on the capital stock of the agent company by deduction from the proceeds of coal sold for the three operating companies, \$5,360, which, with the amount originally paid in, \$640, made the total sum paid in, \$6,000. Practically all of this money and the commissions, amounting to about \$12,400, had been expended in the business of the agent company, advertising the coal, establishing agencies and subagencies, and providing facilities for handling and disposing of the coal. During this time Moore, president of the Thacker Coal and Coke Company, was president, and had the management of the Thacker Coal Company. About the 1st of May, 1896, he retired from the presidency of the agent company and Walter Graham, president of the Logan Consolidated Coal Company, succeeded him. On May 22, 1896, Moore, acting as president of the Thacker Coal and Coke Company, notified the agent company by letter that his company would not deliver any more coal under the contract, assigning as ground for its refusal that the agent company had, in the month of April, 1896, sold the coal of his company at prices less than the minimum prices

stipulated in the agreement, without any authority so to do, and that the agent company had further violated the agreement by not accounting for and paying the proceeds of the sales made in April, 1896, on or before the fifteenth day of May, 1896. The payment complained of was by checks sent from Bluefield to Thacker, under date of May 18, 1896. In reply to this letter, Graham, president of the agent company, wrote Moore and called his attention to the fact that all parties interested had, at a certain meeting, upon the recommendation of Moore himself, unanimously agreed that the president of the Thacker Coal Company, should have discretion to make concessions in price when he should deem it expedient, and that Moore himself, as president of the agent company, had directed the sales complained of to be made as they were made. He further reminded him that it had been the practice, as established by himself, to remit for the proceeds as the money was received from the sale of the coal without regard to the day of payment stipulated in the agreement. The letter further notified the Thacker Coal and Coke Company that it would be expected to adhere to the agreement and accord to the agent company the exclusive right to sell ^{or} all coal which the mining company should produce. Moore, as president, replied that it would withdraw from the agent company. He was then notified that the agent company would demand of his company a sum equal to ten cents per ton for eighty-four thousand tons of coal, less the amount which had been furnished since April 1, 1896, as damages for the breach of the contract.

The agent company continued until the thirty-first day of July, 1896, to handle the coal of the other two companies. On that date, the Thacker Coal and Coke Company, or Moore, with the aid of parties representing the Lynn Coal and Coke Company interest or having purchased that interest, at a meeting after due notice, passed a resolution dissolving the agent corporation and appointing a trustee to wind up the business. This was followed by a chancery suit in which the assets of the defunct corporation were collected by W. P. Slaughter, special receiver and paid out pro rata on its indebtedness, the amount realized by the corporations being fifty-four cents on the dollar. The heavy creditors were the three producing coal companies, the amounts due them having been as follows: The Thacker Coal and Coke Company, \$2,702.34, for coal sold prior to May 22d; the Lynn Coal and Coke Company, \$977.38, for coal sold probably in June and July; the Logan Consolidated Coal Compa

\$1,166.89, for coal probably sold in July. The other indebtedness consisted of small amounts due to various persons, making the total indebtedness, \$5,164.14, while the total assets amounted to \$3,951.71.

In said chancery suit upon petition of the Logan company, an order was made directing Slaughter, special receiver, to use the Thacker Coal and Coke Company for the damages claimed on account of the breach of the contract. In pursuance thereof, this action of assumpsit was brought. In addition to the common counts the declaration contains a special count on the contract. A demurrer was interposed and overruled and there was a verdict and judgment for the defendant, and the plaintiff complains of that judgment.

Under rule 10 of this court, the defendant cross-assigns error in the overruling of the demurrer. I am of the opinion that this assignment is well taken. But for section 10 of chapter 99 of the Code, an action of assumpsit would not lie upon any sealed instrument. Under it, such action does lie upon a promise, undertaking or obligation in such instrument for the payment of ~~the~~ money. The covenant which forms the basis of this action is to deliver coal. It is true that there is a clause by which the defendant company agrees to pay ten cents per ton as liquidated damages, but that only becomes effective upon the breach of the covenant to deliver coal. In the absence of such breach there is no agreement to pay money. The condition upon which this promise to pay money arises is one of the class the determination of which is peculiarly the subject of an action of covenant. The demand sued for here is materially different from those involved in *Kern v. Zeigler*, 13 W. Va. 707, and *Jones v. Sewing Machine Co.*, 38 W. Va. 147, 18 S. E. 478. However, the majority are of a different opinion, and on this point the judgment of the court below must stand.

For the plaintiff in error it is said there is no evidence against his right to recover, but it is insisted for the defendant in error that the judgment cannot be disturbed for two reasons. The first is, that the contract was entered into by the parties for the purpose of destroying competition and is in restraint of trade, and, therefore, void as against public policy. In this connection it is shown that while the stock of the agent corporation stood in name of Graham, Moore and Kirk, presidents of the three buying companies it was taken in their names for conveyance and paid for by the coal companies, and further that an agreement was made by these companies to get the Maritime Coal

Company to join them. Unless this contract is within the inhibition of the act of Congress of July 2, 1890, declaring illegal every contract and combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, it is not necessarily illegal. Although on its face it carries an apparent tendency to stifle competition and is, in that sense, in restraint of trade, it is not illegal by reason of that act unless it affects commerce among the several states or with foreign nations: *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 325, 17 Sup. Ct. Rep. 540, 41 L. ed. 1007. This contract relates simply to the sale of the output of one mine, but it appears from the evidence in the case that the agent corporation was organized for the purpose of handling the output of all the companies operating in a certain vein or seam of coal, and that two other companies had contracts with it like, or similar to, the contract with the defendant company. But it does not appear that this coal ⁶⁴⁷ was to be sold in any particular place nor that under this contract it must necessarily go beyond the state lines. An examination of the decisions of the United States supreme court, construing the act, makes it certain, that to be illegal thereunder, it must fall clearly within the terms of the act: *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32 L. ed. 346; *United States v. Knight*, 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39 L. ed. 325; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41 L. ed. 1007. As this contract does not do so it must be held valid so far as that act is concerned. Is it void at common law? The modern rule on that subject is that, although a contract may be in restraint of trade, if it is not unreasonably so, it is enforceable. "Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law." Mr. Justice Peckham, in *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41 L. ed. 1007. "The sense of the modern decisions is that, if the restraint is only commensurate with the fair protection of the business sold, the contract is reasonable, valid and enforceable": *United States Chemical Co. v. Provident etc. Co.*, 64 Fed. 946. In that case one company sold out its competing business to another, agreeing not to engage in the business any more during the term of the lease. There is ample ground for applying this principle

stances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed." Another interesting case is that of Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629. In that case the contract was one made by three manufacturers of a certain kind of curtain fixtures, under different letters patent, owned by them severally, for the purpose of avoiding competition. It was held valid. In Cohen v. Berlin-Jones Envelope Co., 9 App. Div. 425, 41 N. Y. Supp. 345, manufacturers of envelopes made a contract with another envelope manufacturer by which they agreed to purchase from him, at the prices to be fixed from time to time by the former, a stated quantity of goods manufactured by him during a stated period, and he agreed that, during such time, he would not sell to others at a less price. Nineteen other concerns throughout the country engaged in ⁶⁴⁰ manufacturing envelopes, were not parties to the agreement, and their goods were in competition with those of the contracting parties. The contract was held valid, and the court recognized, as facts to be considered, that the agreement included but a small number of the manufacturers of envelopes, and that, at the time it was made, the business of manufacturing envelopes was demoralized through excessive competition. This case well illustrates the nature of the facts and circumstances to be considered in the present state of the law, in determining whether a contract, such as we have here, is void, as being in restraint of trade.

In Horner v. Graves, 7 Bing. 735, Tindall, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either. It can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the ground of public policy."

Applying here this test and the general principles recognized in Cohen v. Berlin-Jones Envelope Co., 9 App. Div. 425, 41 N. Y. Supp. 345, it is impossible to see how the public was, or could have been, injured by this contract. Three small companies, out of the vast number of coal producing companies

prices, limit production, or suppress competition in such a way as to restrain trade and create a monopoly. To render the combination illegal on this ground, it is not necessary that evil intent or actual injury be shown, but it is sufficient to know that the inevitable tendency of the act is injurious to the public. The fact that the immediate result of the combination has been temporarily to reduce prices, or that it may reduce them, is immaterial in determining the legality of the combination, the court not being governed by the temporary effect upon the prices, but by the power of the combination to control them": 20 Am. & Eng. Ency. of Law, 2d ed., 849, 850.

⁶⁵¹ "In some way several corporations competing in production merge into one, and cease competitive production. By means of large capital this new corporation can produce largely, or limit production, lessen supply, enhance prices, and lower the prices of materials used in production. It may be said that no matter what the form adopted may be, if the end is to curtail production, enhance prices, restrain trade and competition, control the market in commodities, it is condemned by common law and by many statutes in the different states": Brannon on the Fourteenth Amendment, 373.

Discussing the rule stated by Tindal, C. J., in *Horner v. Graves*, 7 Bing. 735, and hereinbefore quoted, Judge Taft said, in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122: "This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: 1. Because it oppresses the covenantor, without any corresponding benefit to the covenantee; and 2. Because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be

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1. BANKRUPTCY—Chattel Mortgage—Lien.—Under the provisions of the act providing that liens obtained through proceedings against a debtor who is insolvent at any time when the mortgage is in the hands of a person against him in bankruptcy are void, it is provided that a bankrupt, and that the trustee of the bankrupt, is deemed to be such lien and passes to the trustee in bankruptcy. The lien acquired by a chattel mortgage on property of a debtor is a mortgage lien, being more than four months prior to the filing of the bankruptcy petition, being more obtained by a person who is not insolvent, is not voided, though such mortgage is subject to the mortgage taking possession of the property within the mortgage's term, within four months prior to the filing of the bankruptcy petition. (Vt.) Thompson v. Fairbanks, 328.

2. BANKRUPTCY—Chattel Mortgage—Transfer.—If property subject to a chattel mortgage is delivered to the mortgagee of the mortgage while the debtor is insolvent, the transfer is void under the national bankruptcy act, providing that transfer of a mortgage with intent to hinder, delay and defraud his creditors shall be void except as to purchasers in good faith for a valuable consideration. Hence it is clearly shown that such insolvent, in transferring the mortgaged property to the mortgagee, intended to do so with intent to hinder any of his creditors. (Vt.) Thompson v. Fairbanks, 328.

3. BANKRUPTCY—Chattel Mortgage—Preference.—If a chattel mortgage takes possession of property under a mortgage executed more than seven years prior to the enactment of the national bankruptcy act, and more than four months prior to the mortgagee being assigned a trustee, such transfer does not constitute a preference in a bankrupt under the meaning of such bankruptcy act, unless it clearly appears that the mortgagee or his agent had reasonable cause to believe that the transfer was intended to give him a preference. (Vt.) Thompson v. Fairbanks, 328.

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— sometimes having a balance to his credit and sometimes being
— own, his mere act of making a deposit is equivalent to an agree-
— that it shall be applied against any overdraft that may exist
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— counting and negotiating promissory notes, drafts, bills of ex-
— , and other evidences of debt; receiving deposits, buying and
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— and obtaining, issuing and circulating notes; and to these speci-
— powers and those necessary to the exercise of the powers ex-
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— ” (Tex.) Commercial Nat. Bank v. First Nat. Bank, 879.

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— appropriate such money to the payment of its debts due from the
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— ate Nat. Bank v. Claxton, 885.

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— business, and not subjected to legal proceedings in bankruptcy or
— insolvency, may deposit in bank in their own names moneys received
— from sales of property and withdraw them on checks payable to
— third persons, and the bank is not liable for honoring such checks.
— (Tex.) Interstate Nat. Bank v. Claxton, 885.

3. BANKING—Moneys Deposited in a Fiduciary Capacity.—A

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— it out of the bank ad libitum. The bank is bound to honor his checks
— and incurs no liability in so doing as long as it does not participate
— in any misappropriation of funds or breach of trust. (Tex.) In-
— terstate Nat. Bank v. Claxton, 885.

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— into the conduct of its customer in order to protect those
— he may hold the fund, but between whom and the bank
— privity. (Tex.) Interstate Nat. Bank v. Claxton, 885.

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BILLS AND NOTES.—Marginal Figures in a note may be resorted to for the purpose of supplying the amount for which the sum is given, when such amount has been wholly omitted in the note. (Vt.) *Kimball v. Costa*, 937.

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BILLS AND NOTES.—Alteration—Spoliation.—If a person who is under obligation to pay a note alters it by striking therefrom a provision for the payment of an attorney's fee for collection upon default in its payment, it is a material alteration and relieves the maker of liability thereon, but if a stranger strikes out such provision in a note, it is simply a spoliation and the maker remains liable. (S. C.) *White v. Harris*, 791.

NEGOTIABLE INSTRUMENTS.—First and Second Indorsers.—Between a first and second indorser, the first is ultimately liable for the payment of the note, but is not primarily liable for it as between himself and subsequent indorsers in the sense that as between principal and surety the principal is primarily liable. (Mass.) *Bank of America v. Wilson*, 570.

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CONVEYANCES. Effect of Accepting.—If there are conflicting claims between two persons respecting their boundary lines, the one executes and the other accepts a deed poll to a specified whereby the wall then standing and in use is divided longitudinally one-half being on the land of each, this is a complete establishment between them of their boundary lines. (Mass.) *Fleming v. Fleming*, 572.

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INSURANCE When not Bound to Commission.—If a broker is employed to secure a contract of insurance, the terms to be agreed upon in such case are those which the broker proposes as offer which the owner of the property will accept. In such case, the broker is not bound to disclose the fact that the owner of the property is not bound to accept a commission on the premium of the contract, but is bound to disclose the fact that the owner of the property is not bound to accept a commission on the premium of the contract. (Mass.) *Collins v. Collins*, 21.

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INSURANCE—Insurance in General Liability—General Owner of Property Owes Duty to Insure Property Therein.—The owner of a property is bound to insure the same and secure a hearing-table within the time of the same. If the owner will not so frantically and promptly take the same from and remove such other of his business as he cannot see the same and carry for the same, he is guilty of a negligence which will render him liable for the same. (Wash.) *Smith v. Jones*, 242.

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2. RAILWAY CORPORATIONS. Duty to Protect Passengers from Excessive Smoking.—The duty of railway corporations is not limited to conduct in the interior of the train, but applies as well to conduct coming from the outside of the car. If danger threatens from smoking the car, it should be averted precisely the same as if impending in any of its partitions or in any of its apartments. (Ill.) *Spangler v. St. Joseph etc. Ry. Co.*, 391.

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3. **BILLS AND NOTES**—Negotiability—Attorney's Fee.—A provision in a note to pay an attorney's fee after default for its collection does not render the note non-negotiable. (S. C.) *White v. Harris*, 791.

4. **BILLS AND NOTES**—Alteration—Spoliation.—If a person who is under obligation to pay a note alters it by striking therefrom a provision for the payment of an attorney's fee for collection upon default in its payment, it is a material alteration and relieves the maker of liability thereon, but if a stranger strikes out such provision in the note, it is simply a spoliation and the maker remains liable. (S. C.) *White v. Harris*, 791.

5. **NEGOTIABLE INSTRUMENTS**—First and Second Indorsers. As between a first and second indorser, the first is ultimately liable for the payment of the note, but is not primarily liable for it as between himself and subsequent indorsers in the sense that as between principal and surety the principal is primarily liable. (Mass.) *Bank of America v. Wilson*, 570.

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2. **CONSTITUTIONAL LAW**.—The Words "Law of the Land" and "Due Process of Law" mean the orderly procedure of courts in the ascertainment of damages for an injury, to the end that the injury suffered shall have a remedy proper and adequate. (*Kan.*) *Ellis v. Krumpholtz, 421.*

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4. **CONSTITUTIONAL LAW**—*Regulation of Business*.—It is only when persons engaged in the same business are subjected to different restrictions, or are granted different privileges under like conditions that the discrimination is open to objection, or can be said to impair the equal right and protection which all may claim under the law. (*Mont.*) *Bonne v. Palitovich, 695.*

5. **POLICE POWER**—*Regulation of Business*.—In the exercise of the police power citizens may, for the public good, be constrained in their conduct and business, with reference to matters in their sphere moral and right. (*Mont.*) *Bonne v. Palitovich, 695.*

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6. **CONSTITUTIONAL LAW**—*Statute Giving Preference to Veterans*.—A statute declaring that persons who have served in the army or navy in the War of the Rebellion, and been honorably discharged therefrom, shall be preferred for appointment for employment to positions in every public department and upon all public work of the state and of the cities and towns therein over persons of equal qualifications, is constitutional. (*Kan.*) *Goodrich v. Mitchell, 43.*

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CONSTITUTIONAL LAW.—A Statute Forbidding and Imposing Penalty for the Use of and Sale of Registered Bottles without written consent of the person whose name appears thereon, unless issued from him, is not unconstitutional. (*Mass.*) *Commonwealth v. Anselovich, 590.*

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id in Part.

CONSTITUTIONAL LAW—Statute Partially Unconstitu-
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for the use and sale of registered bottles without the writ-
nt of their owner, unless purchased from him, is unconsti-
it is not so far essential to the other parts of the act as to
eir validity. (Mass.) *Commonwealth v. Anselvich*, 590.

CONSTITUTIONAL LAW—Statute Void in Part, When Void
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a misapprehension, and a retraction is published within a
specified, no recovery can be had except for damages suffered
respect to property, business, trade, or profession, must be re-
as unconstitutional and void as a whole, though the legis-
might require the service of a notice in order to give the
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14. GAMBLING APPARATUS—Seizure and Destruction.—A stat-
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15. GAMBLING APPARATUS—Destruction of.—When
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CONTEMPT.

1. CONTEMPT.—Statements Filed by the Judge of the court in a contempt proceeding as to matters which occurred in his presence and in open court will be treated as importing absolute verity. (Ind. App.) Mahoney v. State, 276.

2. CONTEMPT.—Regulation of Procedure.—While it is not necessary to look to any statute to ascertain whether a particular act constitutes a contempt, still the legislature may, within limits, regulate the procedure in such cases. (Ind. App.) Mahoney v. State, 276.

3. CONTEMPT.—Disorderly Conduct of Attorney.—If the conduct of an attorney is disorderly, and his demeanor toward the court insulting and of such character as to embarrass the proceedings of the court and the due administration of justice, the court has power on its own motion to punish summarily for the contempt. (Ind. App.) Mahoney v. State, 276.

4. CONTEMPT.—Courts Possess Inherent Power to punish direct contempts. (Ind. App.) Mahoney v. State, 276.

5. CONTEMPTS.—Power of Courts to punish for direct contempts cannot be destroyed or materially abridged by statute. (Ind. App.) Mahoney v. State, 276.

6. CONTEMPT.—Judgment—Time of Rendition and Entry.—As order-book entry in a contempt proceeding reciting that on a certain day "the following proceedings were had and entered of record," followed by a statement of the court's finding and judgment, does not conclusively show that the court did not, five days before, and when the accused was present, adjudge his acts and conduct to be a contempt. (Ind. App.) Mahoney v. State, 276.

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Statute Void in Part.

9. **CONSTITUTIONAL LAW—Statute Partially Unconstitutional.**—If section 18 of the statute of Massachusetts imposing a penalty for the use and sale of registered bottles without the written consent of their owner, unless purchased from him, is unconstitutional, it is not so far essential to the other parts of the act as to affect their validity. (Mass.) *Commonwealth v. Anselvich*, 590.

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TRIAL.—Continuance.—If a person violates a municipal ordinance or the previously announced purpose of testing its constitutionality it is not error to refuse to continue his case to enable him

counsel to have time to investigate the question involved. (Ga.) *Fitts v. Atlanta*, 167.

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In General.

1. **CONTRACTS, Who may Become Parties to.**—A person may become a party to a contract in only one of two ways: 1. By entering into it himself directly or through his agent; or 2. By accepting a stipulation made in his favor by the contractants. (La.) *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 511.

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3. **CONTRACT—Consideration.**—Benefit to be Derived on each side from a contract fulfills the demand of the law as to consideration. (W. Va.) *Rowan v. Hull*, 998.

4. **CONTRACTS With Water Companies, Stipulation in, When not Pour Autrui.**—A contract between a municipal corporation and a waterworks company by which the latter agrees to furnish water to the former for the extinction of fires, flushing sewers, etc., though it is intended for the benefit of citizens, does not constitute a stipulation pour autrui, and they cannot maintain any action for the breach of such contract under a provision of the code declaring that "an equitable action is that which does not immediately arise from a contract, but from equity in favor of a third person not a party to it and for whose benefit certain stipulations have been made." (La.) *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 525.

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5. **MARRIAGE BROKERAGE CONTRACTS.**—A contract, by which a person, by procuring the immediate marriage of a man and woman, and the faithful performance of the marriage contract on the part of the intended husband, for a certain term of years, is to be relieved of a mortgage debt, is a marriage brokerage contract and void. (Vt.) *Jangraw v. Perkins*, 917.

6. **MARRIAGE BROKERAGE CONTRACT—Hastening Intended Marriage.**—A contract to hasten an intended marriage for a consideration is a marriage brokerage contract, and as obnoxious to public policy and law as such a contract to bring about a marriage between strangers. (Vt.) *Jangraw v. Perkins*, 917.

7. **MARRIAGE BROKERAGE CONTRACTS.**—Nothing will be Assumed in Aid of a marriage brokerage contract. (Vt.) *Jangraw v. Perkins*, 917.

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Ultra Vires Acts and Ratification.

2. **CORPORATIONS—Donations Ultra Vires.**—If the statute specifies the purposes for which a corporation may be created, and political purposes do not appear in the enumeration, donations for such purposes are beyond the power of the corporation, and not binding upon minority stockholders who do not sanction by act or acquiescence the making of such expenditures. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

3. **CORPORATIONS—Ratification of Unauthorized Acts of Directors—Estoppel.**—Stockholders in a corporation who took no part in a meeting of directors and stockholders, and did not vote either in person or by proxy, are not estopped to complain of unauthorized acts of directors, ratified at such meeting. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

4. **CORPORATION, Implied Ratification by, When not Inferable.** A corporation does not impliedly ratify an act by accepting its benefits, if the board of directors have no knowledge of the transaction which is claimed to have been ratified, and the president and secretary, who are the only officers having knowledge of it, conceal it from all the other members of such board and deny its existence, and the president is the person who afterward insists that the act was ratified and attempts to assert rights founded on such ratification. (Cal.) *Pacific Vinegar etc. Works v. Smith*, 42.

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5. **CORPORATIONS—Stockholders, When, Subject to the Same Limitations as Directors.**—If, in any particular case, stockholders have authority to manage the affairs of a corporation—in other words, to discharge the functions of directors, and undertake to do so—they, for all the purposes of the affairs thus managed, become directors in effect, and occupy, for the purposes of such affairs, the same relation of trust which directors ordinarily hold toward the corporation. (La.) *Crichton v. Webb Press Co.*, 500.

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6. **CORPORATION, Authority of Officers of.**—The President and Secretary of a corporation are not presumed to have power to execute commercial paper. (Mich.) *Gould v. W. J. Gould & Co.*, 624.

7. **CORPORATIONS—Representations Made by an Agent or Officer of a Corporation** do not bind it, nor create a liability against it, unless concerning the business which it is empowered by its charter to do, and the agent must at the time be acting within the scope of his authority. (Tex.) *Commercial Nat. Bank v. First Nat. Bank*, 879.

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8. **CORPORATIONS.—A Director of a Corporation cannot Act** It in a matter in which he has an adverse interest. (Tex.) *v. Farmers' etc. Nat. Bank*, 835.

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—A pledge of the bonds of a corporation for the purpose of its directors against liability for an indorsement made by it cannot be made where the directors voting to authorize are all interested in it, and a sale under the power given mortgage to secure such bonds is void. (Tex.) *Scott v. etc. Nat. Bank*.

10. CORPORATIONS—Directors and Stockholders, Power of to Contract With and for Themselves.—The holders of a majority of stock in a corporation, who are also its directors, cannot be the final judges in their own case and vote to themselves the money of the corporation over the objection and protest of the other stockholders. Their decision of all questions where their personal interest comes in conflict with that of the corporation is subject to review by a court of equity at the suit of the objecting stockholders. (La.) *Crichton v. Webb Press Co.*, 550.

11. CORPORATIONS, Transactions of Officers of, When not Sustainable.—One who is president and director of a corporation holds toward it a fiduciary and trust relation, and if he purchases notes belonging to it and indorses them to himself without the authority, knowledge or approval of the corporation, he cannot enforce such contract of indorsement against it. (Cal.) *Pacific Vinegar Wks. v. Smith*, 42.

12. CORPORATION.—An Officer of a Corporation is not Qualified to act for his company in any transaction wherein the corporation is dealing with the officer. (Cal.) *Pacific Vinegar etc. Works v. Smith*, 42.

13. CORPORATIONS, Officers of Dealing with Themselves.—A person cannot, as director or other officer of a corporation, enter into a valid contract with himself in his individual capacity, or be both vendor and vendee. (Cal.) *Pacific Vinegar etc. Works v. Smith*, 42.

14. CORPORATION, President of, When may not Hold Property Because He Paid Consideration for.—Where the president of a corporation could not, as against it, claim title to property under a trustee's sale, it is immaterial that he conveyed property in satisfaction of his bid at such sale. This can only give him a claim on the corporation for the amount of his bid or for the value of the property so conveyed. (Tex.) *Scott v. Farmers' etc. Nat. Bank*, 835.

15. CORPORATIONS, Insolvent—Conveyance in Interest of Directors of.—A conveyance made by an insolvent corporation for the benefit, in whole or in part, of its directors is fraudulent as against its creditors. (Tex.) *Scott v. Farmers' etc. Nat. Bank*, 835.

Illegal Acts of Officers.

16. CORPORATIONS—Liability of Officer for Misappropriation of Funds.—If the secretary of a corporation, illegally paid a salary by the directors thereof, is not himself a director and not connected with the act of such directors in fraudulently misappropriating the corporate funds, he cannot be held liable by the minority stockholders, but the directors who caused the money to be paid to him may be required to account therefor. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

17. CORPORATIONS—Illegal Acts of Directors—Laches in Making Complaint.—If a series of illegal acts by the directors of a corporation are continued over a period of years and until the commencement of a suit against them therefor by the minority stockholders, the latter are not guilty of laches in the delay in bringing the suit. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

Actions Against Officers.

18. CORPORATIONS—Action Against Officers by Minority Stockholders.—A corporation is necessarily made a party to an action against its officers for fraudulent misappropriation of its funds; though the action is brought by the minority stockholders in their

names as plaintiffs. It is really brought on behalf of the corporation. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

19. CORPORATIONS—Action Against Officers—Demand on the officers of a corporation to bring suit for their fraud in misappropriating its funds is not a condition precedent to the right of action by the minority stockholders. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

20. CORPORATIONS—Action Against Officers by Minority Stockholders.—Though the allegations in a complaint in an action against the officers of a corporation for their fraudulent misappropriation of its funds are not sufficient to enable the action to be considered as brought on behalf of others than the minority stockholders named as plaintiffs, its sufficiency as an action in their behalf is not impaired by allegations that they bring it for others as well as for themselves. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

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21. CORPORATIONS—Retractive Fixing of Salaries.—The directors of a corporation, who also are a majority of its stockholders, cannot by resolution increase their salaries and give such increase a retrospective effect. (La.) *Crichton v. Webb Press. Co.*, 500.

22. CORPORATIONS—Right to Vote Salary to Director.—In the absence of power emanating from the stockholders from statute, or from by-laws legally adopted, the directors of a corporation have no authority to vote a salary to any of their number. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

23. CORPORATIONS—Right to Vote Salary to Directors.—A resolution of four directors of a corporation voting three of their number salaries prohibited on by-laws previously passed by the same directors and one other is void. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

24. CORPORATIONS—Right of Directors to Vote Salary.—Directors of a corporation cannot act on, nor form part of a quorum to act on, a proposition to vote part of their number salary, increase their compensation, or vice themselves back pay. Their acts in this respect are void. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

Promoters.

25. CORPORATION—Officer and Promoter, When cannot Take Property Earned by.—When property is conveyed to the president of a corporation in consideration that it will build and operate a railway, he must be deemed to hold the property in trust for the corporation, unless it appears by some contract between him and it that he had authority to take title to the property for himself. This remains true, though the president claims the property as promoter and for services rendered the corporation. (Tex.) *Scott v. Farmers' Nat. Bank*, 835.

26. CORPORATION—Promoter's Right to Property of.—If one acting as a promoter and subsequently as president of a street rail corporation renders services to and advances money for it, he may entitle him to compensation, but cannot authorize him to hold property given as a bonus for the construction of its railway unless he is authorized to do so by the corporation itself. (Tex.) *Scott v. Farmers' Nat. Bank*, 835.

27. CORPORATION—Promoter's Right to Property of.—If a promoter of a corporation is a party to a contract whereby he is to acquire

title to property as a bonus for completing and operating a railroad, permits and procures a corporation to be organized to build and operate such road, he is estopped to deny that it is properly substituted in his place under such contract. (Tex.) *Scott v. Farmers' etc. Nat. Bank*, 835.

Removal of Business from State.

28. CORPORATIONS—Removal of Office from State.—The board of directors of a corporation has no power to remove the principal business office of the corporation, its records and funds, beyond the jurisdiction of the state in which the corporation was created and in which its business is actually transacted. Such acts are ultra vires and void as to stockholders not consenting thereto or participating therein. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

29. CORPORATIONS—Removal of Official Business from State.—Directors of a corporation may transact business outside of the state where the corporation is created, but they have no right to move the entire official business of the corporation beyond the state, and their acts in attempting to hold regular monthly meetings and to sit as the board of directors in another state are ultra vires and void. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

Dividends.

30. CORPORATIONS—Dividends, Power of the Courts to Compel. A court of equity may compel the declaration of a dividend at the suit of the minority stockholders of a corporation. (La.) *Crichton v. Webb Press Co.*, 500.

31. CORPORATIONS—Revising Contracts and Acts of for the Purpose of Declaring Just Dividends.—Where the directors of a corporation owning a majority of its stock proceed to carry on business and to contract with themselves against the objections of the minority, a court of equity, at the instance of such minority, must deal with the situation in so far as it is an accomplished fact and compel the declaration of such dividends as it finds equitable under the circumstances, though, in doing so, it must revise the basis of the profits of the business as fixed by such majority directors. (La.) *Crichton v. Webb Press Co.*, 500.

Foreign Corporations—Receivers.

32. CORPORATIONS—Foreign—Enforcing Stockholder's Liability—Sufficiency of Declaration.—In a suit by a receiver for a foreign corporation against a resident stockholder to recover on his statutory liability, an allegation in the declaration that plaintiff, under the law of the state of his appointment, as such receiver, acquired the legal title to all of the assets of the corporation and a right to enforce the stockholder's liability, is a sufficient allegation of title in the plaintiff. (Vt.) *King v. Cochran*, 922.

33. FOREIGN CORPORATIONS—Foreign Receiver—Title to Assets.—A Complaint alleging the liability of a resident stockholder in a foreign corporation under a foreign statute, setting forth the statute, and alleging that under it as interpreted by the courts of that state, "the liability of the defendant as a stockholder is a contractual liability and arises upon the contract of subscription to the capital stock, made by defendant in becoming a stockholder, and that in subscribing to said stock and becoming a stockholder, he thereby guaranteed payment to the creditors of an amount equal to the par value of the stock held and owned by him, which should be payable

1. The purpose of the investigation is to determine if the only way to get the information is to go to the source. The information is to be used for the purpose of the investigation.

2. ~~INTERNAL SECURITY - FOREIGN DISSEM~~ - Foreign Dissem - Meet on
 Russian Dissem - Russian Dissem is a large subject
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RESEARCH

WHERE IS THE NECESSARY?—Where a court finds that a defendant in the necessary to make the expense to be paid by the plaintiff, the law will not allow the plaintiff to recover judgment against a defendant in the amount of the share paid by him.

T. 7

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Law Passed Interpretation of When Making.—A long-
standing question concerning it is now by the courts of the state
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etc.

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CONCLUSIONS

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2. **SHOULD THE LAW—Burden of Proving.**—When, in a criminal prosecution, the identity of the defendant is relied upon as a defense, such defense is affirmative, and the burden to establish it is a preponderance of the evidence rests on the defendant. (Ohio Rev. Code § 11031, 11032, 11033, 11034, 11035, 11036, 11037, 11038, 11039, 11040, 11041, 11042, 11043, 11044, 11045, 11046, 11047, 11048, 11049, 11050, 11051, 11052, 11053, 11054, 11055, 11056, 11057, 11058, 11059, 11060, 11061, 11062, 11063, 11064, 11065, 11066, 11067, 11068, 11069, 11070, 11071, 11072, 11073, 11074, 11075, 11076, 11077, 11078, 11079, 11080, 11081, 11082, 11083, 11084, 11085, 11086, 11087, 11088, 11089, 11090, 11091, 11092, 11093, 11094, 11095, 11096, 11097, 11098, 11099, 11100, 11101, 11102, 11103, 11104, 11105, 11106, 11107, 11108, 11109, 11110, 11111, 11112, 11113, 11114, 11115, 11116, 11117, 11118, 11119, 11120, 11121, 11122, 11123, 11124, 11125, 11126, 11127, 11128, 11129, 11130, 11131, 11132, 11133, 11134, 11135, 11136, 11137, 11138, 11139, 11140, 11141, 11142, 11143, 11144, 11145, 11146, 11147, 11148, 11149, 11150, 11151, 11152, 11153, 11154, 11155, 11156, 11157, 11158, 11159, 11160, 11161, 11162, 11163, 11164, 11165, 11166, 11167, 11168, 11169, 11170, 11171, 11172, 11173, 11174, 11175, 11176, 11177, 11178, 11179, 11180, 11181, 11182, 11183, 11184, 11185, 11186, 11187, 11188, 11189, 11190, 11191, 11192, 11193, 11194, 11195, 11196, 11197, 11198, 11199, 11200, 11201, 11202, 11203, 11204, 11205, 11206, 11207, 11208, 11209, 11210, 11211, 11212, 11213, 11214, 11215, 11216, 11217, 11218, 11219, 11220, 11221, 11222, 11223, 11224, 11225, 11226, 11227, 11228, 11229, 11230, 11231, 11232, 11233, 11234, 11235, 11236, 11237, 11238, 11239, 11240, 11241, 11242, 11243, 11244, 11245, 11246, 11247, 11248, 11249, 11250, 11251, 11252, 11253, 11254, 11255, 11256, 11257, 11258, 11259, 11260, 11261, 11262, 11263, 11264, 11265, 11266, 11267, 11268, 11269, 11270, 11271, 11272, 11273, 11274, 11275, 11276, 11277, 11278, 11279, 11280, 11281, 11282, 11283, 11284, 11285, 11286, 11287, 11288, 11289, 11290, 11291, 11292, 11293, 11294, 11295, 11296, 11297, 11298, 11299, 11300, 11301, 11302, 11303, 11304, 11305, 11306, 11307, 11308, 11309, 11310, 11311, 11312, 11313, 11314, 11315, 11316, 11317, 11318, 11319, 11320, 11321, 11322, 11323, 11324, 11325, 11326, 11327, 11328, 11329, 11330, 11331, 11332, 11333, 11334, 11335, 11336, 11337, 11338, 11339, 11340, 11341, 11342, 11343, 11344, 11345, 11346, 11347, 11348, 11349, 11350, 11351, 11352, 11353, 11354, 11355, 11356, 11357, 11358, 11359, 11360, 11361, 11362, 11363, 11364, 11365, 11366, 11367, 11368, 11369, 11370, 11371, 11372, 11373, 11374, 11375, 11376, 11377, 11378, 11379, 11380, 11381, 11382, 11383, 11384, 11385, 11386, 11387, 11388, 11389, 11390, 11391, 11392, 11393, 11394, 11395, 11396, 11397, 11398, 11399, 11400, 11401, 11402, 11403, 11404, 11405, 11406, 11407, 11408, 11409, 11410, 11411, 11412, 11413, 11414, 11415, 11416, 11417, 11418, 11419, 11420, 11421, 11422, 11423, 11424, 11425, 11426, 11427, 11428, 11429, 11430, 11431, 11432, 11433, 11434, 11435, 11436, 11437, 11438, 11439, 11440, 11441, 11442, 11443, 11444, 11445, 11446, 11447, 11448, 11449, 11450, 11451, 11452, 11453, 11454, 11455, 11456, 11457, 11458, 11459, 11460, 11461, 11462, 11463, 11464, 11465, 11466, 11467, 11468, 11469, 11470, 11471, 11472, 11473, 11474, 11475, 11476, 11477, 11478, 11479, 11480, 11481, 11482, 11483, 11484, 11485, 11486, 11487, 11488, 11489, 11490, 11491, 11492, 11493, 11494, 11495, 11496, 11497, 11498, 11499, 11500, 11501, 11502, 11503, 11504, 11505, 11506, 11507, 11508, 11509, 11510, 11511, 11512, 11513, 11514, 11515, 11516, 11517, 11518, 11519, 11520, 11521, 11522, 11523, 11524, 11525, 11526, 11527, 11528, 11529, 11530, 11531, 11532, 11533, 11534, 11535, 11536, 11537, 11538, 11539, 11540, 11541, 11542, 11543, 11544, 11545, 11546, 11547, 11548, 11549, 11550, 11551, 11552, 11553, 11554, 11555, 11556, 11557, 11558, 11559, 11560, 11561, 11562, 11563, 11564, 11565, 11566, 11567, 11568, 11569, 11570, 11571, 11572, 11573, 11574, 11575, 11576, 11577, 11578, 11579, 11580, 11581, 11582, 11583, 11584, 11585, 11586, 11587, 11588, 11589, 11590, 11591, 11592, 11593, 11594, 11595, 11596, 11597, 11598, 11599, 11600, 11601, 11602, 11603, 11604, 11605,

2. **COMMERCIAL LAW—Insanity—Burden of Proof** where the Defendant is Shown to have been Once Insane.—The proof, on a prosecution for murder, that the defendant had once been insane and that his insanity was recurrent with suicidal and homicidal tendencies, and that he had been discharged from an insane asylum nearly two years before the commission of the homicidal act, does not relieve him from the burden of proving that his insanity existed when such act was committed, nor cast upon the state the burden of proving that such commission was during a lucid interval. (Ohio St.) State v. Smith, 178.

CRIMINAL LAW—Insanity—Charge to Jury Respecting the
 of Evidence of Polar Insanity.—On a trial for murder, the de-
 fendant, on showing that he was committed to an insane asylum
 and homicidal character, is not en-

titled to an instruction to the jury that "proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defeats the legal presumption of sanity and creates a legal presumption of continued lunacy," (Ohio St.) *State v. Austin*, 778.

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4. CRIMINAL LAW—Presenting New Ground of Defense.—On a criminal trial in a superior court on appeal from a municipal court the jury may be instructed that they may consider the fact that one branch of the defense introduced in the former court was not presented in the other, if they are also told that the defendant may have refrained on the ground of policy from putting in his whole defense, and that, unless they are satisfied that the defendant had the evidence in his possession at the time and would have put it in at the trial in the lower court if it had been true, no inference should be drawn against him from his failure to introduce it there. (Mass.) *Commonwealth v. Anselvich*, 590.

See *Pardona*.

CURATIVE STATUTES.

See *Constitutional Law*, 11, 12.

DAMAGES.

1. DAMAGES for Personal Injury—Means Employed to Effect Cure.—If an injured person uses ordinary care in selecting a physician and in the employment of other means to effect a cure, the law regards an injury resulting from the mistake of the physician, or from a failure of the means employed to effect a cure, as a part of the immediate and direct damages which naturally flow from the original injury. (Ill.) *Chicago City Ry. Co. v. Saxby*, 218.

2. DAMAGES for Personal Injury—Organic Disease, Developed by Injury.—Although an injured person has an organic tendency to disease, which is developed by the injury, or by the treatment employed by an ordinarily skillful physician employed to cure the injury, this does not necessarily show that the diseased condition is not a direct damage naturally flowing from the injury. (Ill.) *Chicago City Ry. Co. v. Saxby*, 218.

3. DAMAGES for Personal Injury—Disease Caused by Negligence. If a personal injury negligently inflicted causes or develops a latent tendency to disease, aggravates a prior disease, or leads in immediate sequence to disease, the defendant must respond in damages for such part of the diseased condition as his negligence has caused, and if there can be no apportionment, or if it cannot be said that the disease would have existed apart from the injury, then defendant is responsible for the diseased condition. (Ill.) *Chicago City Ry. Co. v. Saxby*, 218.

4. DAMAGES for Personal Injury—Evidence of Earning Capacity. In allowing damages for personal injury impairing ability to work, the proper inquiry is the comparative capacity of the plaintiff to earn money at the time of and after he had received the injury. (Ill.) *Chicago etc. Ry. Co. v. Spence*, 213.

5. DAMAGES for Personal Injury—Evidence of Earning Capacity. In estimating damages for personal injury impairing ability to labor, evidence of a large salary received by the plaintiff at a remote period

Presumptions.

DEATH—Presumption from Absence.—The absence of a person seven years from his usual place of abode or resort, and of whom account can be given, and from whom no intelligence has been received within that time, raises the presumption that he is dead, and the jury, on proof of such absence, and without countervailing evidence, have a right to presume his death. (Ill.) *Policemen's Ben. Assn. v. Ryce*, 190.

3. DEATH—Presumption of Death arising from an unexplained absence of seven years is not a conclusive presumption, but may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it. (Ill.) *Policemen's Ben. Assn. v. Ryce*, 190.

6. DEATH—Presumption—Instructions.—If an instruction, after stating facts necessary to raise a presumption of the death of a person from seven years' unexplained absence, authorizes the jury upon such proof to presume that such person is dead, it is not erroneous in stating such presumption to be conclusive, if another instruction directs the jury to consider all the facts attending the disappearance of such person, and if it believes from the evidence that he is not dead, to so find. (Ill.) *Policemen's Ben. Assn. v. Ryce*, 190.

7. DEATH—Presumption of—Instructions.—An instruction which singles out the fact of the expressed intention of a missing person to return to his home, as to be considered by the jury in determining whether he is presumptively dead, is properly refused if another instruction requires the jury to take into consideration upon that question all the facts and circumstances developed by the evidence. (Ill.) *Policemen's Ben. Assn. v. Ryce*, 190.

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DEEDS.

1. DEEDS, Omission of Operative Words from.—A correlative clause from A to B of a tract of land to be held for life, following a clause stating that it is the purpose of A by the deed that,

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that it is to be used for the purpose of the law, and not for any other purpose. In *Malins v. Brown* (1884) 11 Q.B. 261, the court held that a power of appointment given to a person for the purpose of the law, and not for any other purpose, is not a power of appointment.

1. *Malins v. Brown* (1884) 11 Q.B. 261—A power of appointment given to a person for the purpose of the law, and not for any other purpose, is not a power of appointment. In *Malins v. Brown* (1884) 11 Q.B. 261, the court held that a power of appointment given to a person for the purpose of the law, and not for any other purpose, is not a power of appointment.

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The Power of Appointment and Trusts

- 1. *Malins v. Brown* (1884) 11 Q.B. 261—A power of appointment given to a person for the purpose of the law, and not for any other purpose, is not a power of appointment.
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TRUSTS

The Trusts of the Law

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1. *Trusts of the Law*—The trusts of the law are those trusts which are created by the law, and not by the intention of the parties. In *Malins v. Brown* (1884) 11 Q.B. 261, the court held that a power of appointment given to a person for the purpose of the law, and not for any other purpose, is not a power of appointment.

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tutes of Minnesota, subject in its just proportion with other real estate to the payment of such debts as cannot be paid from his personal estate, and entitled to partition; and in her action for partition, his creditors cannot enforce their right to subject her interest to its proportion of their claims. (Minn.) *Keith v. Mellen*, 679.

2. **DOWER** is Waived in Massachusetts by the widow's acceptance of the provisions of her husband's will. (Mass.) *Matthews Thompson*, 550.

3. **FRAUDULENT CONVEYANCE**, Effect of upon Grantor's life's Right to Dower.—If a husband and wife convey to a third person, who, in turn conveys to her, and the conveyance is in fraud of the husband's creditors and is, therefore, set aside as fraudulent, she regains her right to dower. (Mass.) *Matthews v. Thompson*, 50.

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ELECTRICITY.

CORPORATIONS, ELECTRIC—Negligence—Noninsulated Wires.—The discharge of a fatal current of electricity from an electric company's heavily charged wire, through its coming in contact with another fallen wire, to the injury of a pedestrian, and due to defective and negligent insulation, renders the electric company liable, without regard to its actual knowledge of the fallen wire, or its diligence in discovering it. (S. C.) *Parsons v. Charleston etc. Ry. Co.*, 800.

See Railroads, 6, 7; Street Railways, 15.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

EQUITY JURISDICTION.—A court of equity, having obtained jurisdiction for one purpose, may retain that jurisdiction for all purposes of the action necessary to the complete protection of the plaintiff's rights. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

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See Husband and Wife, 4.

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EVIDENCE.

In General.

1. **EVIDENCE**.—Minutes Purporting to be of Corporation Filing, consisting of separate sheets of paper pinned to the leaves of a record-book, are not sufficiently identified to be admissible in evidence. (Mont.) *McConnell v. Combination Min. etc. Co.*, 703.

2. **EVIDENCE**—BY-laws of Corporation.—If part of the by-laws of a corporation are introduced in evidence over objection, the

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EVIDENCE—... [illegible text] ...

THE EVIDENCE

EVIDENCE—... [illegible text] ...

THE EVIDENCE

EVIDENCE—... [illegible text] ...

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EVIDENCE—... [illegible text] ...

EVIDENCE—... [illegible text] ...

view of fixing the act on the defendant or to assist in his arrest. (La.) State v. Foley, 493.

EVIDENCE—Res Gestae—Declarations of Injured Person.—Police officers, hearing a shot, ran about four hundred feet and were found a person lying in the gutter, writhing in pain caused by gunshot wound, who, being asked by them who shot him, answered, "Foley shot me without cause or provocation," such answer was held admissible in evidence on the trial of the person named for the murder of the person so shot. (La.) State v. Foley, 493.

Foreign Law.

FOREIGN LAW—Who may Testify Respecting.—Under a statute authorizing proof of the unwritten law of a foreign country by the testimony must be given by persons familiar with the law of such country, or who are at least in a situation to render the knowledge probable. (Iowa.) Banco De Sonora v. Bankers' Mut. etc. Co., 367.

FOREIGN LAW.—Probably Judicial Notice should be taken of the fact that the civil law is the foundation of Mexican jurisprudence; but this extends no further than that that general system prevails, without taking notice of details. (Iowa.) Banco De Sonora v. Bankers' Mut. etc. Co., 367.

15. FOREIGN LAW.—The Common Law is not Presumed to be in force in any state or country where English institutions have not been established. (Iowa.) Banco De Sonora v. Bankers' Mut. etc. Co., 367.

Judicial Notice.

16. EVIDENCE—Judicial Notice.—The Court may Take Judicial Notice that Atmospheric or Vacuum Brakes are in general use on passenger trains and common on freight cars, and are rarely ineffective. (Mich.) People v. Detroit United Ry., 626.

17. EVIDENCE—Judicial Notice—Conflict of With Testimony of Witnesses.—The validity of a municipal ordinance requiring the use of air or electric brakes cannot be made to depend upon what the court or jury may conclude from the testimony or opinions of such witnesses as happen to be brought into court on the first case that arises, when the provisions of such ordinance, when viewed in the light of facts of which the court may take judicial notice, are reasonable and clearly within the discretion of the city council, either by virtue of reserved power resting in contract or of the police power. (Mich.) People v. Detroit United Ry., 626.

Expert Testimony.

18. WITNESSES—Experts—Contradiction.—The opinion of an expert witness as testified to cannot be contradicted by showing that a certain author is or is not standard, or by what he has said upon the subject under examination. (S. C.) Mitchell v. Leech, 811.

19. WITNESSES—Expert.—An expert witness may state his opinion when in response to an objection that he is consulting authorities, the court instructs him to tell what he knows, what his experience has been, and what his opinion is. (S. C.) Mitchell v. Leech, 811.

20. EVIDENCE—Admissibility of Expert Testimony.—Whenever the subject of inquiry is a matter which lies so far outside the range of common knowledge and experience that the jury is presumably unable to pass upon it intelligently without the aid of the opinion of persons possessing peculiar skill and

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THE UNIVERSITY OF CHICAGO

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THE UNDESIRABLE CHARACTER OF THIS DOCUMENT.—Where a man is married a wife is the administrator of his estate, and she is well acquainted with his mind to his widow & to her estate in administration & in other ways except the manner of her death. Justice v. Marshall, 25

of the proceeds of a life insurance which are exempt from estate tax under the provisions of Section 2035, the right of exempt income to be included in the gross estate.

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See Banks and Banking, 4-8.

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See Constitutional Law, 13.

FOREIGN LAW.

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Forfeiture. See Insurance.

FRAUDS, STATUTE OF.

SALES—Duplicate Memoranda—Statute of Frauds.—If a purchaser, at the time of sale, with the knowledge of the seller, adds a provision to the duplicate memorandum of sale furnished him, such provision becomes a part of the completed contract, and the whole is sufficient to satisfy the statute of frauds, although the seller fails to change his copy to correspond with that of the purchaser. (Vt.) Equitable Mfg. Co. v. Allen, 915.

FRAUDULENT CONVEYANCES.

In General.

1. **FRAUDULENT TRANSFERS.**—A Conveyance Made to Defraud the Grantor's Creditors is void as against them. (Tex.) Scott v. Farmers' etc. Nat. Bank, 835.

2. **FRAUDULENT CONVEYANCE.**—If a Voluntary Conveyance is made under conditions in which its effect must be to hinder, delay, or defraud creditors of the grantor, the inference follows, as a matter of law, unless there is something else to control it, that such conveyance is void as against them. (Mass.) Matthews v. Thompson, 550.

3. **VOLUNTARY CONVEYANCES, What Will not Relieve from Fraudulent Character.**—Freedom from moral turpitude and an innocent and honest intention to accomplish a good object will not relieve a voluntary conveyance of its fraudulent character in reference to its effect upon the legal rights of creditors. (Mass.) Matthews v. Thompson, 550.

4. **FRAUDULENT SETTLEMENTS**—Fraudulent Intent, When must be Presumed.—If, after deducting the property which is the subject of a voluntary settlement, sufficient available assets are not left for the payment of the settler's debts, the law infers that it was made with a fraudulent intent, and it becomes the duty of the judge, on giving the case to the jury, to tell them that they must presume such intent. (Mass.) Matthews v. Thompson, 550.

5. **SETTLEMENT, When must be Declared Voluntary and Fraudulent.**—If a husband and wife, knowing that he is insolvent, convey substantially all his property to a third person for the purpose of having the latter convey it to another to be held in trust, to manage the property with power to sell and mortgage, and to apply the net proceeds to paying taxes and assessments and to pre-existing mortgages, and such debts and expenses of the husband as seem judicious to the trustee, and, on the decease of such band, to sell any property remaining and appropriate the p

as may be designated in his will, and in default of a will, to such persons as would inherit his estate, the conveyance so made by such husband and wife must be held voluntary and fraudulent as against his creditors, though the court finds that no purpose of cheating them existed and the parties acted with an honest intention. (*Mass.*) *Matthews v. Thompson*, 550.

6. FRAUDULENT CONVEYANCES—Fraudulent Grantee.—If a deed is in fraud of a judgment creditor of the grantor, and both he and the grantee participate in the fraud, the grantee, as against such judgment creditor, is not entitled to protection to the extent of the consideration paid for the property. (*Ill.*) *Biggins v. Lambert*, 238.

Sale of Goods in Bulk.

7. FRAUDULENT TRANSFERS—Sale of Goods in Bulk—Remedy of Creditors.—If a sale of a stock of goods in bulk is made without demanding a list of the seller's creditors as required by statute declaring such sale void, the purchaser is not liable to the seller's creditors in a direct action at law, and their only remedy is an action of attachment or garnishment. (*Wash.*) *Rothchild Bros. v. Trewella*, 973.

8. SALES—Fraud—Stock of Goods in Bulk.—One who buys a stock of goods in bulk without complying with the statute requiring him to demand a list of the seller's creditors, and to see that the purchase price is applied to their payment, holds the goods as a trustee for such creditors, and is liable to them in garnishment, although he is not indebted to the seller and has disposed of the goods. (*Wash.*) *Kohn v. Fishbach*, 941.

See *Dower*, 3.

FREEDOM OF SPEECH.

See *Municipal Corporations*, 7.

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WILD GAME—Land Owner's Rights Respecting.—The owner of land has the exclusive privilege of hunting, and the unqualified right of controlling and protecting the wild game thereon. (*Minn.*) *L. Realty Co. v. Johnson*, 677.

HIGHWAYS.

1. HIGHWAYS.—An Easement in a Public street or highway is the public and common right to use the same for the passage of persons and property, and purposes incidental thereto. (*Minn.*) *L. Realty Co. v. Johnson*, 677.

2. HIGHWAYS—Rights Respecting Wild Game Therein.—In granting an easement across his land for a highway, the owner does not surrender his right to foster and protect wild game thereon, and the public acquires no right to kill or molest such game while

as temporarily passing to and fro across the highway. (*Minn. Realty Co. v. Johnson*, 677.)

ANIMALS—Runaway Horses—Contributory Negligence—Question for Jury.—If a person is injured while on the public highway being run into by the runaway team of another, alleged to be vicious and in the habit of running away, and driven by an incompetent servant, the questions whether the team was really a "runaway" team, and whether plaintiff was guilty of contributory negligence are for the jury to determine if the evidence is conflicting. (*Vash.*) *Lynch v. Kineth*, 958.

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wrongfully takes it from her trunk and places it on record, and she, knowing of this fact, delays for three years to give any notice of her claim, during which time the property is purchased for the benefit of a railway company which enters into possession and makes improvements without notice of any defect or want of delivery of the deed, she is estopped from maintaining an action to quiet her title on the ground that her deed was never delivered. (Cal.) Baillarge v. Clark, 75.

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INDORSEMENT.

See Bills and Notes.

INFANTS.

AN ADULT is a Person who has attained the age of twenty-one years; but the statutes of Iowa modify this rule to the extent of declaring a female an adult at eighteen years of age, and all persons such upon marriage. (Iowa.) Banco De Sonora v. Bankers' Mutual etc. Co., 367.

INJUNCTIONS.

1. **INJUNCTION** Though Damages are Nominal.—An injunction may issue against the continuance of an act though the damages due to it are nominal, if it is an invasion of another's right, as by wrongfully causing water to flow upon his land. (Cal.) Allen v. Stowell, 80.

2. **THE PRINCIPLES** upon Which Mandatory and Prohibitory Injunctions are Granted do not Materially Differ, though perhaps the courts are less inclined to grant the former than the latter. (Cal.) Allen v. Stowell, 80.

3. **A MANDATORY INJUNCTION** may Issue to Compel the Removal of a Dam which causes water to be diverted from its natural course and to flow on plaintiff's land, thereby destroying his trees and excavating deep gulches. (Cal.) Allen v. Stowell, 80.

See Usury.

INSANE PERSONS.

See Criminal Law, 1-3.

INSTRUCTIONS.

See Trial, 3-5.

INSURANCE.

Fire Insurance.

1. **FIRE INSURANCE**—Insurable Interest.—A husband has no insurable interest in a house which he builds at his own expense and lives in with his wife on land which is her separate estate. (W. Va.) Tyree v. Virginia Ins. Co., 983.

2. FIRE INSURANCE—Ownership of Property.—An insurance company has a right to insert a condition in a policy that it shall not be liable "if the title or interest of the assured is less than the entire, absolute, unconditional, unencumbered fee-simple ownership"; and if the insured has not such a title or interest, he cannot recover on the policy. (W. Va.) *Tyree v. Virginia Ins. Co.*, 983.

3. INSURANCE—Fire—Keeping Books—Noncompliance with Policy.—A contract of fire insurance which requires the insured to "keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," is not complied with by merely keeping a daily cash-book which only shows the amount of cash taken in at the end of each day, giving no indication of the source from which the cash is derived, whether from cash sales, the payment of past due bills, or otherwise; and evidence establishing the fact of keeping such cash-book alone, shows such a noncompliance of the insured with his contract of insurance as prevents him from recovering on the policy. (Ga.) *Everett-Ridley-Ragan Co. v. Traders' Ins. Co.*, 99.

Mail Packages.

4. INSURANCE OF MAIL PACKAGES—Mailing Letter of Advice.—If one condition of a policy insuring packages sent by mail requires the mailing of the packages by being "deposited and registered at the postoffice," and another condition requires a letter of advice to the insurer to be "deposited in the postoffice at the place of mailing," this last condition is not complied with by dropping the letter in a mail-box. (Iowa.) *Banco de Sonora v. Bankers' Mutual etc. Co.*, 367.

5. INSURANCE OF MAIL PACKAGES—Conflict of Laws.—If a policy insuring mail packages during their transportation through specified countries is issued to a bank located in a country not specified in the policy, but the transportation by mail is initiated in one of such countries, the portion of the contract prescribing the manner of packing and sealing the property is governed by the law of the country where the bank is located. (Iowa.) *Banco de Sonora v. Bankers' Mutual etc. Co.*, 367.

6. INSURANCE—Condition Precedent.—If the insured does not comply with a condition precedent in a policy, no contract of insurance is effected. (Iowa.) *Banco de Sonora v. Bankers' Mutual etc. Co.*, 367.

Life Insurance.

7. INSURANCE, LIFE—Place of Contract.—A statute of one state providing that no life insurance company, doing business in that state, shall declare any policy lapsed or forfeited for nonpayment of premiums, except after special notice as provided therein, applies only to business transacted in that state and does not apply to a policy issued in that state to a citizen of another state where the policy is delivered and the premium paid. (La.) *Grevenig v. Washington Life Ins. Co.*, 474.

8. INSURANCE, LIFE—Place of Contract.—If a policy of life insurance is issued in one state by an insurance company incorporated therein, and sent to its agent in another state for delivery therein upon payment of the premium, the contract is completed at the place of such agency and is governed by the law of the latter state. (La.) *Grevenig v. Washington Life Ins. Co.*, 474.

9. LIFE INSURANCE.—The Representation in an Answer for Life Insurance that the Applicant is in Good Health or that he has not been subject to illness means that he has not suffered illness of a serious nature tending to undermine his constitution, and that his state of health is free from disease that affects the general soundness or healthiness of the system. (Mich.) *Blumenthal v. Berkshire Life Ins. Co.*, 604.

10. INSURANCE, LIFE.—The Representation in an Application that the Applicant Has not Been Attended by a Physician nor consulted one previously is not false if the applicant merely omits to state a treatment for some temporary indisposition. (Mich.) *Blumenthal v. Berkshire Life Ins. Co.*, 604.

11. INSURANCE, LIFE.—In an Application for Life Insurance the Words "Chronic or Persistent" do not differ materially from "chronic and persistent." (Mich.) *Blumenthal v. Berkshire Ins. Co.*, 604.

12. INSURANCE—Designation of Wife as Beneficiary.—The statement in a benefit certificate that the beneficiary is related to the insured as wife is descriptive of her relation to him, and does not in itself provide for payment to his widow only. (Iowa.) *White v. Brotherhood of American Yeomen*, 323.

13. INSURANCE—Change in Beneficiary's Relation to Assured.—A policy of life insurance, or a designation of a beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased, unless it is otherwise stipulated in the contract. (Iowa.) *White v. Brotherhood of American Yeomen*, 323.

14. INSURANCE—Divorced Wife as Beneficiary.—A married woman named as beneficiary in a policy of insurance on the life of her husband, is entitled to the proceeds of the policy, notwithstanding a divorce obtained by her before his death. (Iowa.) *White v. Brotherhood of American Yeomen*, 323.

15. INSURANCE, LIFE—Proof of Loss—Instructions.—The question whether proof of the death of the insured has been furnished is a question of fact for the jury, but the legal effect of such proof is a question of law for the court. Hence to instruct the jury that in order to award a recovery for the plaintiff it must believe, from the evidence, that defendant had received "satisfactory evidence of the death," is erroneous unless the meaning of such satisfactory evidence is defined. (Ill.) *Policemen's Ben. Assn. v. Ryce*, 190.

16. LIFE INSURANCE—Policy as Evidence.—If a life insurance policy appears on one sheet of paper embracing four pages, the first containing the main contract, the next certain printed conditions and agreements, the next the application and certain acknowledgments and agreements of the applicant, and the last the usual indorsement indicating that the folded paper contains a policy on the life of the insured, the policy consists of the whole document, and an offer to submit it in evidence carries everything on the four pages, rendering it unnecessary to thereafter offer specially the copy of the application for the policy in order to get it before the court. (La.) *Grevenig v. Washington Life Ins. Co.*, 474.

Accident Insurance.

17. INSURANCE, ACCIDENT—Application.—A Clause cannot be Eliminated from a Policy on the ground that it is not expressly referred to in the application. (Cal.) *Blunt v. Fidelity etc. Co.*, 34.

18. AN INSURANCE Against Accident may Exclude Injuries Received by the Assured While Insane, though not self-inflicted, nor due to his want of sanity. (Cal.) *Blunt v. Fidelity etc. Co.*, 34.

19. INSURANCE Against Accident—Stipulation Excluding Liability During Insanity.—A policy insuring against accident, but providing that for injuries received while the assured was insane, the measure of liability of the insurer should be a sum equal to the premium paid, does not warrant a recovery for injuries received during a period of insanity, though not self-inflicted nor due to want of sanity. (Cal.) *Blunt v. Fidelity etc. Co.*, 34.

20. INSURANCE Against Accident—Words not to be Interpolated in the Policy.—Where a policy insuring against accident exempts the insurer from liability for injuries intentionally inflicted on himself by the assured, or inflicted upon himself or received while insane, the court cannot interpolate the word "intentionally" before the second clause, and hold the insurer liable for injuries received by the assured while insane, though not intentionally inflicted or received. (Cal.) *Blunt v. Fidelity etc. Co.*, 34.

21. INSURANCE, ACCIDENT—Death from Ptomaine Poisoning. When a policy insuring against accident provides that it does not cover injuries resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, a recovery cannot be sustained for injuries and death resulting from eating unsound and spoiled oysters not known to be such when eaten. (Tex.) *Maryland Casualty Co. v. Hudgins*, 857.

Time to Commence Action.

22. INSURANCE—Stipulation as to Time to Commence Actions—Application of to Minors.—A stipulation in a policy of insurance limiting the time within which suit may be brought thereon is good even as against minor beneficiaries. (Kan.) *Mead v. Phoenix Ins. Co.*, 412.

23. INSURANCE—Failure to Sue within the Time Required in the Policy, whether Excused by an Injunction.—Where a policy insuring against death by accident provides that legal proceedings to recover thereunder must be brought within six months from the time of death, an action brought after that time cannot be sustained on the ground that an injunction issued after the time began to run prevented the beneficiary from maintaining suit, especially if the injunction was dissolved before the six months expired, leaving a short, but sufficient, time, in which to bring action. (Mass.) *Paul v. Fidelity etc. Co.*, 594.

24. INSURANCE Against Death by Accident.—The Failure to Sue Within the Time Prescribed in a policy insuring against death by accident cannot be excused on the ground that the persons entitled to sue did not know of the limitation of time contained in the policy. (Mass.) *Paul v. Fidelity etc. Co.*, 594.

25. INSURANCE Against Death by Accident—Estoppel to Rely on Provision Prescribing Time After Which Suit cannot be Brought. The fact that an insurer against death by accident in various negotiations with, and communications to, persons entitled to maintain action on the policy did not call their attention to the provision therein limiting the time within which action thereon might be brought, nor in any way indicate that reliance would be brought on provision, is not a waiver thereof, nor does it create any estoppel against subsequent reliance on it. (Mass.) *Paul v. Fidelity etc. Co.*,

See Exemptions.

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Insurance, conflict of laws, laws of the state where the corporation was organized, when do not affect business in another state, 484.
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See Usury.

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JUDGES.

APPELLATE PRACTICE—Disqualification of Judge.—If a judge from whom a change of venue is taken on the ground of prejudice subsequently sits as a member of the appellate court in judgment on the case, that is no ground for reversal. (Ill.) *Biggins v. Lambert*, 238.

JUDGMENTS.

1. **RES JUDICATA**—Judgment Between Different Parties.—A Judgment in an Action by a Taxpayer Against a City Board of Public Works, in which it is enjoined from placing a concrete foundation under a street railway is not admissible in a subsequent action between the municipality and the railway to establish that the ordinance requiring the city to do such work is ultra vires, because the parties to the two actions are different. (Mich.) *City of Detroit v. Detroit Ry. Co.*, 600.

2. **JUDGMENTS**—Vacating.—If a judgment has been entered requiring the removal of an obstruction in a public street, and subse-

quently a state of facts arises which renders the maintenance of such obstruction lawful, an order declaring such judgment no longer binding and effective should be granted. (Ga.) *Marietta Chair Co. v. Henderson*, 156.

JUDICIAL NOTICE.

See Evidence, 16, 17.

JUDICIAL SALES.

1. **JUDICIAL SALE**—Omission of Seal from Order.—If an order of sale is properly signed by the clerk of the court and contains a complete copy of the decree of foreclosure, duly certified by the clerk, with his signature and the seal of the court attached, it is not material that the seal of the court was omitted from the order of sale. (Cal.) *Hager v. Astorg*, 68.

2. **JUDICIAL SALES**—The Omission of the Seal from an Order of Sale renders it and all proceedings thereunder void, and the purchaser acquires no title. (Kan.) *Stouffer v. Harlan*, 396.

JURISDICTION.

See Patents; Process.

JURY.

1. **JURORS**, Interests of as Citizens of a Municipal Corporation. The interest of a juror as a citizen and taxpayer of a municipal corporation is not sufficient to disqualify him in a civil action to which the city is a party. (Mich.) *City of Detroit v. Detroit Ry. Co.*, 600.

2. **JURY AND JURORS**—Jurors cannot impeach their own verdict. (Ind. App.) *Weil v. Stone*, 243.

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LANDLORD AND TENANT.

LANDLORD AND TENANT—Technical Violation of Lease—Measure of Damages.—If a tenant in good faith and under a mistake of right commits a technical violation of his lease by cutting timber from the land which is put into buildings constructed and left on the premises, the measure of damages against him is the value of the timber cut, in the stump, and interest from the time of appropriation. (S. C.) *Lewis v. Virginia-Carolina Chemical Co.*, 806.

See Mines and Minerals, 2-4.

Note.

Landlord and Tenant, possession of real property by a tenant, effect of as notice of his rights and of the rights of the landlord, 348, 349.

LARCENY.

LARCENY—General Owner Depriving Keeper of Special Property.—If personal property is in the possession of another than the general owner by virtue of some special right or title, as bailee or otherwise, the taking of the property by the general owner from such person in possession is larceny, if done with the felonious intent of depriving such person of his rights. (Wash.) *State v. Nelson*, 945.

LEASES.

See Landlord and Tenant; Mines and Minerals, 2-4.

LETTERS PATENT.

See Patents.

LIBEL AND SLANDER.

In General.

1. **LIBEL, Constitutionality of Statute Impairing the Right to Recover for.**—A statute declaring that before any civil action shall be brought for libel published in a newspaper, the plaintiffs must serve a notice on the publisher specifying the statement alleged to be false and defamatory, and that if it appears the libel was published in good faith, and its falsity was due to mistake or misapprehension of the facts, and that a retraction has been published within a time specified, the plaintiff shall recover actual damages only, and that the words "actual damages" shall be construed to include all damages that the plaintiff shall show that he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever, is unconstitutional, because it takes from a libeled person the right of remedy by due course of law for the injury suffered by him. (Kan.) *Hanson v. Krehbiel*, 422.

2. **LIBEL—Question for Jury.**—If a publication is claimed to be a libel only when taken in connection with the circumstances of its publication, the jury should be directed to determine from the writing and such circumstances whether it is libelous or not. (Ga.) *Holmes v. Clisby*, 103.

3. **LIBEL—Question for Jury.**—It is generally a question for the jury whether the writing complained of is libelous or not. (Ga.) *Holmes v. Clisby*, 103.

4. **LIBEL—Burden of Proof—Inference of Malice.**—It is incumbent upon the plaintiff in a suit for libel to prove the publication of a writing which is susceptible of being construed to be a libel, and the law then immediately raises in his behalf a presumption that he is innocent of the charge and that the disperser of the libel was actuated by malice. (Ga.) *Holmes v. Clisby*, 103.

5. **LIBEL—Evidence to Rebut Inference of Malice.**—Evidence, though insufficient to establish good faith and to sustain a plea of privilege, may still be of a character sufficient to rebut the inference of malice and to mitigate damages. (Ga.) *Holmes v. Clisby*, 103.

Libel of a Class.

6. **LIBEL OF A CLASS.**—One who, without exercising due care to ascertain the meaning and effect of a writing which is libelous of a class, publishes it under circumstances where it would be construed as applicable to one or more persons of such class, cannot shield himself on the ground of privileged communication, and that he did not know that it was harmful, in its nature, when the exercise of the slightest care and intelligence would have demonstrated that the publication would be harmful to some who were within the range of its effect. (Ga.) *Holmes v. Clisby*, 103.

7. **LIBEL OF COMMUNITY.**—One who willfully publishes a libel aimed at a community will be held responsible to anyone whom it may injure, although he may be a stranger to the libeler. (Ga.) *Holmes v. Clisby*, 103.

Damages.

8. **LIBEL, Damages for, General and Special.**—The common law recognizes two classes of damages for libel—general and special. General damages are those which the law presumes must naturally, proximately, and necessarily result from the publication of the libelous matter. (Kan.) *Hanson v. Krehbiel*, 422.

9. **LIBEL—Damages.**—If, in an action for libel, the evidence demands a finding that the article as published was a libel upon the plaintiff, but not actuated by malice, the jury are authorized to mitigate the damages, even to the extent of reducing them to a nominal sum, but not to find a general verdict for the defendant. (Ga.) *Holmes v. Clisby*, 103.

10. **LIBEL—Damages.**—If, in an action for libel, the jury are authorized to find that the published article was a libel upon plaintiff, though not actuated by malice, and to mitigate damages even to a nominal sum, it is error for the trial judge to fail to instruct the jury in reference to the law of nominal damages, even though there is no written request for such instructions. (Ga.) *Holmes v. Clisby*, 103.

Privileged Communications.

11. **LIBEL AND SLANDER—Privileged Communications** include statements reasonably necessary to be made, and made in good faith, to protect the interests of the maker, or of one for whom he is agent. (Ga.) *Holmes v. Clisby*, 103.

12. **LIBEL AND SLANDER—Privileged Communications.**—Willful falsehoods are always inconsistent with good faith, and can never constitute privileged communications. (Ga.) *Holmes v. Clisby*, 103.

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LICENSES.

1. **LICENSES Taken to Carry on Certain Business within a city** are taken with notice that the city may impose any reasonable regulation for the conduct of such business which may be necessary to peace and good order. (Mont.) *Butte v. Paltrovich*, 698.
2. **CONSTITUTIONAL LAW—Licensing of Horseshoers.**—A statute requiring horseshoers to pass an examination and pay a license fee, and providing a penalty for following their trade without a license, is unconstitutional, as an arbitrary interference with personal liberty and private property without due process of law. (Wash.) *In re Aubrey*, 952.

LIMITATION OF ACTIONS.

Act of Laws.

LIMITATION OF ACTIONS—Conflict of Laws.—Where, by a right of action is given which did not exist at the common law, the statute giving the right also fixes the time within which it may be enforced, the time so fixed becomes a limitation upon the right, and will control, no matter in what forum the action is brought. (Minn.) *Negaubauer v. Great Northern Ry.*

LIMITATION OF ACTIONS—Conflict of Laws.—If a Deathful act or neglect occurs in Montana, an action therefor

may be maintained in Minnesota at any time within three years, the period of limitation of such actions being three years under the statutes of Montana, but only two years under the statutes of Minnesota. (Minn.) *Negaubauer v. Great Northern Ry. Co.*, 674.

Out of the State.

3. **LIMITATION OF ACTIONS**—"Out of the State."—One retaining a residence in the state at which process against him may be served must, nevertheless, be regarded as "out of the state" within the meaning of those words as used in the statute of limitations. (Kan.) *Williams v. Metropolitan Street Ry. Co.*, 377.

4. **STATUTE OF LIMITATIONS**—"Out of the State."—A foreign corporation, though it has agents and does business within the state and a valid judgment might be entered against it on service of process on such agents therein, must be regarded as "out of the state" within the meaning of a statute providing that if, when a cause of action accrues against a person, he is out of the state, the period limited for the commencement of the action shall not begin to run until he comes into the state. (Kan.) *Williams v. Metropolitan Street Ry. Co.*, 377.

Who may Plead Statute.

5. **LIMITATIONS OF ACTIONS**, Plea of, When not a Personal Privilege.—When an action to foreclose a mortgage seeks the sale of real estate which has vested in the widow and heirs at law of the mortgagor either by will or descent, they, or either of them, or the successor in interest of either, may plead the statute of limitations in protection of the estate from foreclosure and sale. (Ohio St.) *Hopkins v. Clyde*, 737.

6. **LIMITATION OF ACTIONS**.—A Purchaser at a Judicial Sale Acquires the Right and Title of the Judgment Debtor in the real estate sold, and may therefore plead the statute of limitations in protection of such property if the judgment debtor could do so. (Ohio St.) *Hopkins v. Clyde*, 737.

7. **LIMITATIONS OF ACTIONS**—Who may Plead Against the Enforcement of a Lien.—Anyone in privity with a lien sought to be foreclosed against premises or anyone who can be said to stand in place of the person in whose favor the statute of limitations runs, is entitled to plead it. (Ohio St.) *Hopkins v. Clyde*, 737.

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LOTTERIES.—"Suit Clubs" whose members pay to a tailor ~~lar~~ per week, and which hold weekly drawings for thirty the member drawing a certain number receiving a suit of

clothes and then ceasing to be a member of the club, and the last member who pays for thirty weeks being entitled to a thirty dollar suit of clothes, regardless of the drawings, are lotteries. (Ga.) *De Florin v. State*, 177.

MANDAMUS.

MANDAMUS.—A Controversy Between Parties to a Contract respecting their rights thereunder cannot be determined in proceedings by mandamus. (Ohio St.) *Mt. Vernon v. State*, 783.

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MASTER AND SERVANT.

The Relation.

1. **MASTER AND SERVANT**—Relation, How Created.—Unless there is some act or contract by one person which expressly or impliedly recognizes another as his servant, the relation of master and servant does not exist between them. (Ga.) *Atlanta etc. R. R. Co. v. West*, 179.

Volunteers.

2. **MASTER AND SERVANT**—Volunteers—Duty Toward.—One who without being employed, or at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for the master, is a mere volunteer, and not entitled to that degree of diligence on the part of the master which he is bound to exercise with reference to his servants. The master is only bound not to injure the volunteer willfully, and to care not to injure him after notice of his peril. (Ga.) *Atlanta etc. R. R. Co. v. West*, 179.

3. **MASTER AND SERVANT**—Infant Volunteers.—The fact that a volunteer servant is of tender years and without sufficient mental capacity to appreciate the danger to which he is exposed, while it may be an element of notice to the master of the peril of the volunteer, cannot change the relations of the parties, or supply the place of negligence on the part of the master, nor impose upon him any duty not ordinarily imposed by law in relation to volunteers. (Ga.) *Atlanta etc. R. R. Co. v. West*, 179.

Dangerous Appliances and Place to Work.

4. **EMPLOYER'S LIABILITY**—Unguarded Cogwheels.—An employer does not furnish a reasonably safe place to work when he places unguarded cogwheels under a table at which an employé works and

within a foot from where he stands, it being practicable to guard them, and the exigencies of the service occasionally requiring the employé to stoop below the table to pick up fallen boards. (Iowa.) *Buehner v. Creamery Package etc. Co.*, 354.

5. **EMPLOYER'S LIABILITY—Insufficient Light.**—An employé who continues to work in a place after it becomes insufficiently lighted, without complaint on his part or premise on the part of the employer to remedy the defect, assumes the risk of the service. (Iowa.) *Buehner v. Creamery Package etc. Co.*, 354.

6. **MASTER AND SERVANT—Dangerous Machinery.**—A master is under no obligation to provide a guard for inner and ordinarily inaccessible parts of machinery, with which no one can come in contact except by imprudent conduct. (La.) *Scheultz v. Eckardt Mfg. Co.*, 452.

7. **EMPLOYER'S LIABILITY for Defective Appliances—Custom.**—The rule that a negligent act will not be excused because customary, although proof of custom is evidence, but not conclusive, as to whether the act is negligent, applies to the act of an employer in selecting and furnishing tools and appliances for the use of his employes. (Minn.) *Anderson v. Fielding*, 665.

8. **EMPLOYER'S LIABILITY—Concurrent Negligence.**—If an employé would not have been injured had not cogwheels near his place of work been negligently left unguarded, it is immaterial, so far as concerns the employer's liability, whether there was another concurrent cause of the injury, such as the negligence of a coemployé. (Iowa.) *Buehner v. Creamery Package etc. Co.*, 354.

9. **MASTER AND SERVANT—Negligence—Proximate Cause.**—If machinery breaks and a workman, in attempting to repair it, is injured, the causes which brought about the break are remote and not the proximate cause of the injury. (La.) *Schoults v. Eckardt Mfg. Co.*, 452.

Promise to Repair.

10. **EMPLOYER'S LIABILITY for Defective Appliances—Promise to Repair.**—An employé is not chargeable with the assumption of the risk or with contributory negligence, as a matter of law, by continuing to use for a reasonable time a machine or appliance which he knows to be unsafe, and appreciates the risk of using, where he has complained and the employer has promised to remedy the defect, unless the appreciated danger is so imminent that a man of ordinary prudence would refuse longer to use it until made safe. A reasonable time, within this rule, is any period which does not preclude all reasonable expectations that the promise may be kept, and is generally a question of fact. (Minn.) *Anderson v. Fielding*, 665.

11. **EMPLOYER'S LIABILITY—Promise to Repair.**—Where an employé complains that cogwheels where he is at work should be guarded, and is assured that they will be, he cannot be held, when injured two days later, to have assumed, as a matter of law, the risk resulting from leaving them unguarded. (Iowa.) *Buehner v. Creamery Package etc. Co.*, 354.

Contributory Negligence of Employé.

12. **EMPLOYER'S LIABILITY—Contributory Negligence.**—Where an employé throws his hand into revolving cogwheels, the danger of which would have been apparent had he not been distracted by surrounding conditions, it is for the jury to say whether the circumstances were calculated to throw him off his guard and excuse him

for acting as he did. (Iowa.) *Bushner v. Creamery Package etc. Co.*, 354.

13. MASTER AND SERVANT—Contributory Negligence of Servant.—If there are two ways of doing a thing, one safe and the other unsafe, and the servant knows it, or ought to know it, and he chooses the unsafe, and is injured, he cannot recover against the master for the injury. (La.) *Schoultz v. Eckardt Mfg. Co.*, 452.

14. MASTER AND SERVANT—Contributory Negligence of Servant.—A master is not bound to keep his premises so lighted that any and all repair work may be done without the necessity of procuring extra light. If such light is needed, a servant who undertakes to repair without procuring it and is injured, cannot recover against the master. (La.) *Schoultz v. Eckardt Mfg. Co.*, 452.

Assault by Railway Employé.

15. MASTER AND SERVANT—Assault by Servant.—A railroad company is not liable for an assault and battery committed upon an intruder on its premises by its agent or servant, who, at the time, is acting wholly outside of his general authority and beyond the scope of his employment. (Ga.) *Central of Georgia Ry. Co. v. Morris*, 164.

MILLSITES.

See Waters and Watercourses, 7-9.

MINES AND MINERALS.

Location of Claims.

1. MINES AND MINING—Location Notice—Evidence.—The legislature has power to provide rules for marking the boundaries of mining claims, and to provide for a record of such location and what the recorded paper must contain, and if such location notice fails to conform to the statute, it is not admissible in evidence. (Mont.) *Baker v. Butte City Water Co.*, 683.

Mining and Oil Leases.

2. LANDLORD AND TENANT—Mining Lease—Right to Take Timber.—A lease to mine phosphate rock and as incident thereto, to build railroads and tramways, and to use the timber on the land for the construction of the superstructure thereof, and to cut and use all the fuel proper for the use of the machinery and employes of the mining lessee, including fuel necessary for washing rock, but not including the right to cut wood or timber for market, does not include the right to use timber cut from the land in the construction of buildings and structures upon the land other than railroads or tramways, although they are necessary to carry out the object of the lease. (S. C.) *Lewis v. Virginia-Carolina Chemical Co.*, 806.

3. OIL LEASE, When not Forfeited.—Under a lease or grant whereby, in consideration of one dollar, a grant is made of all the oil and gas on specified premises, with a right to enter thereon for drilling and operating wells, and reserving to the grantor one-sixth of the oil produced and saved from the premises, and providing that in case no well should be completed within ninety days, the grant was to become void, unless the second party should pay twenty-five cents per acre per year, there is an implied covenant on the part of the lessee that he will drill and operate such number of oil wells on the lands as ordinarily would be required for the production of the oil therein contained, but the breach of the covenant does not

work a forfeiture of the lease, and the remedy is in damages only. If a certain cause of forfeiture is expressed in a lease, others may not be implied. (Ohio St.) *Venedocia Oil and Gas Co. v. Robinson*, 773.

4. OIL LEASE, When Becomes a Lease from Year to Year.—If a grant or lease of land for the purpose of drilling and operating for oil and gas provides that in case no well is completed within ninety days, the grant shall become void unless the grantee shall first pay twenty-five cents per acre per year, the lessee, after the expiration of the ninety days and until a well is drilled, becomes a lessee from year to year at the annual rental specified. If at the end of a year the lessor refuses to accept further payments, he thereby refuses longer to waive performance, but the lease does not eo instanti terminate, and the parties are left as to the implied engagement to develop as they were at the time of the execution of the lease. (Ohio St.) *Venedocia Oil and Gas Co. v. Robinson*, 773.

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MONOPOLIES.

MONOPOLY.—Where Three Coal Companies, engaged in developing a new coal field and mining from the same vein, organize another corporation to act as their sales agent, and contract to give it the right to sell their output at a uniform price not to be departed from without the consent of all, the agent company to advertise, introduce, and sell the coal for a stipulated commission, the contract is illegal as against public policy. (W. Va.) *Slaughter v. Thacker Coal etc. Co.*, 1013.

MORTGAGES.

Priority of Liens.

1. MORTGAGES—Priority of Liens.—Where a deed is executed to secure an existing indebtedness from the grantor to the grantee, and subsequently the grantor executes a mortgage to secure a debt to another, an agreement thereafter made that the deed shall secure obligations incurred after the execution of the mortgage, does not give the lien of the grantee priority, as to the after-acquired indebtedness, over the lien of the mortgagee. (Iowa.) *Crooks v. Jenkins*, 326.

Mortgagee in Possession.

2. MORTGAGEE in Possession, Purchaser Under Void Foreclosure Sale, When Becomes.—If a sale under an order issued on a judgment foreclosing a mortgage is made to the mortgagee and is void because the seal was omitted from such order, but the purchaser takes possession pursuant to the sale, he becomes a mortgagee in position who cannot be displaced without payment of the mortgaged (Kan.) *Stouffer v. Harlan*, 396.

MORTGAGEE in Possession, Lawful Entry of, What is.—The action that the entry of the mortgagee must be lawful does not that it must have been effected under a formal right capable of enforcement by legal proceedings, but that it must not be through

any unlawful or wrongful act upon which the mortgagee would be estopped to found a right. (Kan.) *Stouffer v. Harlan*, 396.

4. A MORTGAGEE in Possession is one who has possession of the mortgaged premises under such circumstances as to make the satisfaction of the lien a prerequisite to his being dispossessed. (Kan.) *Stouffer v. Harlan*, 396.

Foreclosure and Trustee's Sale.

5. FORECLOSURE OF MORTGAGE—Known Grantee Under Unrecorded Deed Need not be Made a Party.—If the mortgagor conveys the mortgaged premises to one who does not place his conveyance on record, he need not be made a party defendant to a suit to foreclose, though the mortgagee has actual knowledge of the conveyance, if the statute of the state declares that no person holding a conveyance from or under the mortgagor which does not appear of record need be made a party to the action, and the judgment therein rendered and the proceedings therein had are as conclusive against a party holding such unrecorded conveyance as if he had been made a party to the action. (Cal.) *Hager v. Astorg*, 68.

6. FORECLOSURE, Beneficiary Under a Trust Deed.—If, at the time a mortgage is executed, the mortgagor holds the property in trust for another, the latter need not be made a party defendant to the suit to foreclose if, before its commencement, such trust has terminated, though in the meantime he has become the holder of the legal title under an unrecorded conveyance. (Cal.) *Hager v. Astorg*, 68.

7. FORECLOSURE, Questions Settled by.—In an action of ejectment where the plaintiff's title is based on a sale under a decree foreclosing a mortgage, the defense cannot be made on behalf of a grantee of the mortgagor under an unrecorded conveyance that the suit was prematurely brought, because the note sued on was not due, that there was a question respecting the amount of interest due, and that the mortgagee had agreed to release the mortgagor from his liability on the note. (Cal.) *Hager v. Astorg*, 68.

8. SALE Under Trust Deed to Clear Title and Without Payment of Any Money.—When a sale of real property is made by a trustee acting under a trust deed to secure the payment of indebtedness, where the object of the sale is merely to clear the title, the creditor not being an active party in the transaction, and no money being paid as the result of the sale, no title vests in the purchaser. (Tex.) *Scott v. Farmers' etc. Nat. Bank*, 835.

See Chattel Mortgages; Notice.

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MUNICIPAL CORPORATIONS.

Boundaries—Exclusion of Territory.

1. CONSTITUTIONAL LAW—Delegation of Legislative Authority to Exclude Territory from a City.—A statute providing that whenever it shall be desired to exclude any lot or block or any unplatted farm from the boundaries of any city, the persons so desiring shall give notice in the manner specified that a petition will be presented

to the district court for such exclusion, and that such court, upon presentation of such petition, must hear testimony, and if satisfied therefrom that due notice has been given and that no public right will be injured or endangered, must order the corporate boundaries to be changed by such exclusion, is unconstitutional, because it, in effect, delegates to the petitioners the legislative power to determine the boundaries of the municipal corporation in question. (Kan.) *City of Hutchinson v. Leimbach*, 384.

Contract with Water Company.

2. **MUNICIPAL CORPORATIONS—Waterworks, Citizens and Taxpayers, When not Parties to Contracts of with.**—If a municipal corporation enters into a contract with a water company to furnish water for the extinction of fires and other purposes, it does not, in so doing, act as agent for its citizens and taxpayers, nor do they become parties to such contract and entitled as such to maintain an action for damage suffered by them for its nonperformance. (La.) *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 525.

Regulation of Business—Pawnshops.

3. **MUNICIPAL ORDINANCE Regulating Business—Reasonableness—Presumption.**—The question of the reasonableness of an ordinance regulating a certain business is one of fact of which the body enacting it is the best judge, and in the absence of a clear showing to the contrary, its reasonableness must be presumed. (Mont.) *Butte v. Paltrovich*, 698.

4. **CONSTITUTIONAL LAW—Ordinances Regulating Business.**—The fact that ordinances or police regulations operate as an interference with the free exercise of the classes of business made subject to them cannot alone be made the test of their validity. If they afford reasonable facilities for the conduct of the business, they do not amount to a prohibition, but only to a regulation thereof. (Mont.) *Butte v. Paltrovich*, 698.

5. **CONSTITUTIONAL LAW—Ordinance Regulating Pawnshops.**—An ordinance making it unlawful to keep open a pawnshop after 6 o'clock in the evening does not amount to a prohibition of the business, and is a constitutional regulation thereof. (Mont.) *Butte v. Paltrovich*, 698.

6. **CONSTITUTIONAL LAW—Ordinance Regulating Pawnshops.**—An ordinance does not deny the equal protection of the law, simply because it regulates the hours of operating and keeping open pawnshops, loan offices, and second-hand stores only, if it applies alike to all engaged in that class of business. (Mont.) *Butte v. Paltrovich*, 698.

Public Meetings in Streets.

7. **CONSTITUTIONAL LAW—Municipal Ordinances—Freedom of Speech.**—A municipal ordinance declaring it unlawful to hold public meetings in the streets without the consent of the municipal authorities is not unconstitutional, either as interfering with the liberty of speech or as making an arbitrary discrimination in favor of some persons, nor as an unreasonable and oppressive exercise of police power, nor because the city has no legal power to enact it. (Ga.) *Fitts v. Atlanta*, 167.

Ice Bridges.

MUNICIPAL CORPORATIONS — Negligence — Defective
a.—A city owes to the public the duty of keeping its bridges

in safe condition, and is liable for special injury resulting from neglect to perform such duty after notice of the defect. (La.) *Buechner v. City of New Orleans*, 455.

Street Assessments.

9. **ESTOPPEL to Resist Enforcement of Street Assessment on the Ground that the Statute on Which It was Made is Unconstitutional.**—Where a majority of abutting lot owners petition a city council to pave a street, and, after due notice, proceedings are taken for its paving, and bids are made for doing the proposed work, all before any question of the constitutionality of the statute arises, but thereafter and after a decision has been made by the supreme court under which it is probable that such statute may be declared unconstitutional, the bids are accepted and a contract entered into, without objection, for doing the work, the city authorities cannot, after obtaining the benefit of the contract, claim that they had no power to enter into it, because the statute authorizing it is unconstitutional. (Ohio St.) *Mt. Vernon v. State*, 783.

Vacation of Streets.

10. **MUNICIPAL CORPORATIONS—Vacating Streets—Legislative Power.**—The law-making power of the state has plenary authority in reference to public streets, and may declare an existing street vacated without providing for the submission of the question to judicial inquiry. (Ga.) *Marietta Chair Co. v. Henderson*, 156.

11. **MUNICIPAL CORPORATIONS—Vacating Streets—Delegation of Power.**—The power to vacate an existing street may be delegated by the law-making power to a municipal or other subordinate public corporation. (Ga.) *Marietta Chair Co. v. Henderson*, 156.

12. **MUNICIPAL CORPORATIONS—Rights in Vacated Streets.**—If a street has been vacated, the interest of the public therein ceases, and the burden upon the land which has been used as a street is removed, and the owner of the fee again becomes entitled to use his property in such manner as he sees proper, without regard to the former servitude to which it was subject. (Ga.) *Marietta Chair Co. v. Henderson*, 156.

13. **MUNICIPAL CORPORATIONS—Vacating Streets—Reverting of Fee.**—Whenever a street is vacated, it is presumed that the fee is in the adjacent land owners, and that the right of each extends to the middle of the way. (Ga.) *Marietta Chair Co. v. Henderson*, 156.

14. **MUNICIPAL CORPORATIONS—Vacating Streets—Damages.** A property owner damaged by the closing of a street under legislative authority waives his right to demand compensation as a condition precedent to the closing of the street by allowing it to be closed without instituting proceedings to prevent it, and is remitted to his action at law for damages. (Ga.) *Marietta Chair Co. v. Henderson*, 156.

15. **MUNICIPAL CORPORATIONS.—Public Streets cannot be Vacated for the benefit of a private individual, but only for the benefit of the public.** (Ga.) *Marietta Chair Co. v. Henderson*, 156.

16. **MUNICIPAL CORPORATIONS—Vacating Streets—Compensation.**—A statute authorizing the closing of a public street need not provide for the payment of compensation for property thereby taken or damaged, when the general law of the state provides a method for ascertaining the compensation to be made in such case. (Ga.) *Marietta Chair Co. v. Henderson*, 156.

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NEGLIGENCE.*Contributory Negligence.*

1. **NEGLIGENCE—Contributory Negligence is Matter of Defense,** which, to be availed of, must be pleaded. (La.) Buechner v. New Orleans, 455.

2. **NEGLIGENCE—Contributory.—The Burden of Proof is on the defendant** to show that the plaintiff was negligent, and that his negligence contributed to his injury. (La.) Buechner v. New Orleans, 455.

3. **NEGLIGENCE—Contributory—Burden of Proof.—To make out a prima facie case the plaintiff must allege and prove that he was injured by the negligence of the defendant, and it is then presumed that plaintiff was free from negligence.** (La.) Buechner v. New Orleans, 455.

4. **NEGLIGENCE—Contributory—Evidence.—Contributory negligence must be pleaded by the defendant as a defense, and if not so pleaded evidence is not admissible to show it.** (La.) Buechner v. New Orleans, 455.

Children.

5. **NEGLIGENCE—Contributory—Infants.—It is presumed that a child of tender years is not guilty of contributory negligence.** (La.) Buechner v. New Orleans, 455.

6. **NEGLIGENCE—Contributory—Infants.—If a child of tender years falls through a hole in a city bridge and is drowned, the question of its contributory negligence is one of fact for the jury, after considering his maturity and capacity, and all of the circumstances of the case.** (La.) Buechner v. New Orleans.

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NEW TRIAL.

NEW TRIAL—Instructions.—Failure of the court to explain to the jury the meaning of technical terms used in his instructions is not ground for a new trial in the absence of an appropriate and timely request for such explanation. (Ga.) *Holmes v. Clisby*, 103.

NOTICE.

1. NOTICE—Possession of Land.—A Mortgagee of real estate takes his security charged with notice of the equities of a third person in possession of the property, at the time of the execution of the mortgage. (Iowa.) *Crooks v. Jenkins*, 326.

2. NOTICE.—The Possession of Land by a Tenant or lessee is not only notice of all his rights and interests connected with or growing out of the tenancy itself or the lease, but is also notice of all interests acquired by collateral or subsequent agreements. (Iowa.) *Crooks v. Jenkins*, 326.

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- possession of real property need not be by residence thereon, 337.**
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- possession of real property, persons chargeable with notice from, 353.**
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- possession of real property, when extends to adjoining property, 341.**
- possession of real property where due inquiry did not disclose possessor's title, 335.**

NUISANCE.

NUISANCE, Who may Maintain an Action for.—One who, as a member of his father's family, is on premises injuriously affected by nuisance, without having any property right there, can maintain an action for damages on account of sickness and discomfort

resulting to him from the nuisance. (Tex.) Fort Worth etc. Ry. Co. v. Glenn, 894.

2. NUISANCE—Exercise of Care.—Blasting Operations carried on continuously for more than one year on premises platted for city purposes constitute a nuisance prima facie, irrespective of the degree of care exercised, and recovery may be had for injury to neighboring property, arising from concussions of the air. (Mont.) Longtin v. Persell, 723.

OIL LEASE.

See Mines and Minerals, 3, 4.

Note.

Holographic Wills. See Holographic Wills.

OPTIONS.

See Principal and Agent, 3-5; Vendor and Vendee, 3, 4.

PARDONS.

1. CONDITIONAL PARDON—Suspension of Sentence.—Power conferred on the governor to grant pardons includes the power to grant a conditional pardon; and an indefinite suspension of sentence on conditions is, in practical effect, a conditional pardon. (Iowa.) State v. Hunter, 361.

2. CONDITIONAL PARDON.—As a Condition to the continuance of a suspension of sentence, the governor may require the prisoner to abstain from acts not in themselves criminal nor in violation of law. (Iowa.) State v. Hunter, 361.

3. CONDITIONAL PARDON—Revocation.—No Judicial Proceeding is necessary to authorize the governor to terminate the suspension of a sentence which he has granted on the express condition that it may be revoked at his discretion and shall remain in force only during his pleasure. (Iowa.) State v. Hunter, 361.

4. CONDITIONAL PARDON—Whether a Contract.—It is only in a somewhat fictitious sense that a conditional pardon is spoken of as a contract; it is, as a matter of fact, simply the grant and acceptance of a privilege, with a condition attached, in accordance with which the privilege may be revoked. (Iowa.) State v. Hunter 361.

5. CONDITIONAL PARDON—Forfeiture of Credit for Good Conduct.—The governor has no authority to insert a provision in a suspension of sentence, that a violation of its conditions shall work a forfeiture of the prisoner's statutory diminution of sentence for good conduct while in prison. (Iowa.) State v. Hunter, 361.

PARTNERSHIP.

In General.

1. PARTNERSHIP.—Persons Dealing with a partnership must take notice of the partnership, the identity of its members, its character, its business, and the general course thereof. (Ill.) Morrison v. Austin State Bank, 225.

2. PARTNERSHIP—Fraud—Person Aiding in.—A partner who disposes of partnership goods that the benefit may come to him also perpetrates a fraud upon the partnership, and a person dealing w

him knowing that such is to be the result is a party to such fraud, and can receive no benefit from it. (Ill.) *Morrison v. Austin State Bank*, 225.

3. **PARTNERSHIP—Fraud—Person Aiding in.**—If a person knowingly receives partnership property from a partner for his past due individual debt, he knows that he is perpetrating a fraud upon the partnership, and cannot take anything by the transaction, which is voidable. (Ill.) *Morrison v. Austin State Bank*, 225.

4. **PARTNERSHIP—Fraud—Innocent Purchaser.**—If a person knowingly takes partnership paper which is negotiable from a partner in payment of a past due individual debt of the latter, and transfers it to an innocent purchaser for value, the latter acquires a good title thereto. (Ill.) *Morrison v. Austin State Bank*, 225.

Property.

5. **PARTNERSHIP—Property of.**—Although partnership property has many of the characteristics of estates in common and in joint tenancy, yet the interests of the partners in the firm property is neither that of joint tenants nor cotenants, but is *sui generis*. Each partner is seized *per my et per tout*. (Ill.) *Morrison v. Austin State Bank*, 225.

6. **PARTNERSHIP—Real Estate of.**—The legal title to real estate acquired by purchase with partnership assets, whether taken in the names of the partners individually or in that of the partnership, is in the partners as cotenants, but the equitable title is in the partnership and is treated as personalty, and on the death of one of the partners, the survivor may sell the entire equitable interest in the land, and the purchaser may compel a conveyance from the heirs of the deceased partner. (Ga.) *Hartnett v. Stillwell*, 151.

7. **PARTNERSHIP—Real Estate of—Administrator's Sale of.**—A purchaser at an administrator's sale of a deceased partner's interest in real estate, the title to which is in the partnership name, acquires only the interest of the intestate in the land, on a settlement of the partnership affairs. The proceeds of such sale belong to the estate of the deceased partner, and are no part of the assets of the partnership. (Ga.) *Hartnett v. Stillwell*, 151.

8. **PARTNERSHIP—Real Estate of, Administrator's Sale of.**—If title to land is taken in the individual names of the partners, an innocent purchaser at an administrator's sale of a deceased partner's interest takes it unencumbered by the secret equity of the partnership, but the proceeds of the sale may be recovered from the administrator by the surviving partner, if necessary to pay firm debts. (Ga.) *Hartnett v. Stillwell*, 151.

9. **PARTNERSHIP—Real Estate of—Administrator's Sale of—Purchase by Surviving Partner.**—If title to land is taken in the individual names of the partners, and the surviving partner becomes the purchaser at an administrator's sale of his deceased partner's interest therein, the purchaser is estopped from claiming the proceeds of the sale as partner assets with which to pay firm debts. (Ga.) *Hartnett v. Stillwell*, 151.

PARTY-WALLS.

A **PARTY-WALL** is not Created by a Conveyance of a strip of land on which a specified half of the wall rests. (Mass.) *Fleming v. Cohen*, 572.

2. WALLS, When not Party-Walls Though Owned by Adjoining Proprietors.—If each of two persons is seised of a specified half of a wall and nothing more, and no right of support or shelter has been acquired by the one from the other, each can tear down his house when he pleases without regard to the injury he may do to his neighbor's property. (Mass.) *Fleming v. Cohen*, 572.

3. WALLS, Easement of Support in, When Results from a Conveyance of a Part.—Where there are buildings on adjoining lots having a wall in common, and one of the proprietors grants a specified half of such wall to the other, the law implies a reservation of an easement in the half of the wall granted and the grant of a corresponding easement in the half retained. The title of each owner, of necessity, becomes subject to the easement of the other to support his building by means of the common structure, even though for this purpose less than one-half was used. (Mass.) *Fleming v. Cohen*, 572.

4. PARTY-WALLS, Prescriptive Right to.—After the prescriptive period has ripened, a division wall may take on the character of a party-wall and be charged as such, though the right thus acquired is limited to the exact use of it by the adjoining owner who claims the easement. (Mass.) *Fleming v. Cohen*, 572.

5. DIVISION WALLS—Mutual Easement of Support in Where a Part Only was in Use by the Adjacent Proprietor at the Time of the Grant.—Where the wall of a completed structure stood on or near the line dividing two lots and for a part of its length was in use as a party-wall, and a conveyance was made by one of the owners to the other of a specified half of such wall, the easement of support resulting from the execution and acceptance of such conveyance extends to the whole wall, and is not restricted to the part actually used as a party-wall at the time the conveyance was made. (Mass.) *Fleming v. Cohen*, 572.

6. DIVISION WALLS—New Structure.—The easement of support afforded by a division wall is not confined to the original building, but extends to and covers a new structure that may be erected and supported by it, and if from use and the lapse of time the wall becomes weakened or dilapidated, or is partially destroyed, either proprietor may repair or rebuild it. (Mass.) *Fleming v. Cohen*, 572.

7. DIVISION WALL.—The Fact that a Division Wall has Inclined from a Perpendicular and leans over from three to five inches does not alter the rights of the parties, and he away from whose side it inclines has the same right to use it as before. (Mass.) *Fleming v. Cohen*, 572.

8. DIVISION WALLS—Right to Increase Height of.—Where a division wall exists in which each of two adjoining owners has an easement of support, each has the right to carry the wall up to a height greater than is necessary to support the building of the other. (Mass.) *Fleming v. Cohen*, 572.

PATENTS.

JURISDICTION.—The Situs of Letters Patent follows the person of their owner and ordinarily is at his place of residence. No court is authorized to assume jurisdiction over them in a state in which he does not reside and where no jurisdiction is acquired over him except by service of process on him beyond the state. (Mass.) *Hildreth v. Thibodeau*, 560.

PAWNSHOPS.

See Municipal Corporations, 3-6.

PERPETUITIES.

1. **PERPETUITIES.**—Under the statutes of Michigan the absolute power of alienation cannot be suspended by any limitation or condition for a longer period than two lives in being at the creation of the estate. (Mich.) *Casgrain v. Hammond*, 610.

2. **PERPETUITIES.**—Any Suspension of the Power of Alienation not Based on Lives in Being is void, and that power is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. (Mich.) *Casgrain v. Hammond*, 610.

3. **PERPETUITIES.**—Instance of.—If an estate is conveyed to be held in trust, to control and pay over the income to the grantor during her natural life, and should she die before the period of fourteen years from the execution of the trust, then to divide the net income among five designated persons, and, at the expiration of that term, to convey the property to the same persons or the survivor of them, which conveyance further declares that it is made to satisfy claims existing against the grantor and in favor of the beneficiaries for moneys received by the former as their guardian, and, before any of them can receive a conveyance of the interest to be conveyed to them by the trustee, he must execute a proper release of all claims against the grantor's estate, this is an attempt to create a forbidden perpetuity, because it is measured by a term of years, and the trustee and the beneficiaries cannot, by joining in a conveyance, give a good title. (Mich.) *Casgrain v. Hammond*, 610.

4. **PERPETUITIES.**—Effect of Conveyance Attempting to Create. If a conveyance attempts to vest an estate in a trustee to be held in trust for fourteen years and then conveyed to specified beneficiaries or the survivor, it must be adjudged void as an attempt to create a perpetuity, and no interest vests in the trustee or the beneficiaries, and, on the death of the grantor, the property attempted to be conveyed must be regarded as belonging to her estate. (Mich.) *Casgrain v. Hammond*, 610.

PHYSICAL EXAMINATION.

See Evidence, 6, 7.

PLEADING.

PLEADING.—Facts Alleged by One Party Need not be Pleaded by the Other. (Tex.) *Maryland Casualty Co. v. Hudgins*, 857.

See Limitation of Actions, 5-9.

POWER OF ATTORNEY.

See Principal and Agent, 3-5.

PRESCRIPTION.

See Adverse Possession; Waters and Watercourses, 12, 13.

Note.

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of death where persons perish by a common disaster, 210.

of survivorship did not exist at the common law, 210.

of validity of municipal regulation of street railways, 642.

PRINCIPAL AND AGENT.

In General.

1. **AGENCY**—Contract of, not signed by Agent.—A written proposition to employ one as agent to sell land, signed by the proposer and accepted but not signed by the agent, makes a binding contract of agency. (W. Va.) *Rowan v. Hull*, 998.

2. **PRINCIPAL AND AGENT**—Same Person Acting as Agent for Both Parties.—Any contrivance which reduces the two parties to one, and admits the agent representing antagonistic interests to make a bargain for himself in so far against the policy of the law that the contract must be held void, unless the principal chooses afterward, with knowledge of all the circumstances that affect his position, to ratify the act of his agent. (Cal.) *Pacific Vinegar etc. Works v. Smith*, 42.

Power of Attorney to Sell Land.

3. **OPTION**.—A Power of Attorney to Sell Land does not authorize the execution of an option. (W. Va.) *Tibbs v. Zirkle*, 977.

4. **OPTION**.—If, Under a Power of Attorney to Sell, an agent executes an option, his principal and his coagent are not bound thereby; and if the latter purchases the land, he does not hold it as trustee for the claimant under the option. (W. Va.) *Tibbs v. Zirkle*, 977.

5. **AN OPTION** Given Under a Power of Attorney Which does not Authorize the option binds the agent whose land is included therein. (W. Va.) *Tibbs v. Zirkle*, 977.

Ratification.

6. **EXPRESS RATIFICATION** can be Found Against a Party Only when it is shown that he was in possession of all the facts and acted after such knowledge. (Cal.) *Pacific Vinegar etc. Works v. Smith*, 42.

Revocation of Agency.

7. **AGENCY**—Power not Coupled with Interest.—The commission to be earned by an agent to sell land is not such an interest as renders his authority irrevocable. (W. Va.) *Rowan v. Hull*, 998.

8. **AGENCY**—Revocation.—An Agency for a Definite Period to sell land may be revoked at will by the principal, but for a wrongful revocation within such period he will be answerable to the agent in damages. (W. Va.) *Rowan v. Hull*, 998.

9. **PRINCIPAL AND AGENT**.—The Relation of Principal and Agent is not Revoked by the Mere Insolvency of the Latter unless he voluntarily or involuntarily surrenders and the law assumes control of his property. (Tex.) *Interstate Nat. Bank v. Claxton*, 885.

See Alteration of Instruments; Banks and Banking, 4-8; Benefit Associations, 1; Brokers.

Note.

Privileged Communications. See Libel.

PROBATE PROCEEDINGS.

See Executors and Administrators.

PROCESS.

JURISDICTION in Personam cannot be Acquired by the service of process at the residence of the defendants beyond the state. (Mass.) Hildreth v. Thibodeau, 560.

PROHIBITION.

1. **PROHIBITION** Lies Only Where There is Usurpation and abuse of power, when an inferior court has not jurisdiction of the subject matter, or having jurisdiction, exceeds its legitimate powers. (W. Va.) Woods v. Cottrell, 1004.

2. **PROHIBITION** does not Lie After Judgment has been given and fully executed. (W. Va.) Woods v. Cottrell, 1004.

3. **IF PROHIBITION** is Asked After Judgment, it must appear that execution has not been done. (W. Va.) Woods v. Cottrell, 1004.

4. **PROHIBITION** Lies Only to Judicial Tribunals, and a constable or a clerk is not a judicial officer. (W. Va.) Woods v. Cottrell, 1004.

5. **PROHIBITION** does not Lie, Where Other Plain Remedy exists. (W. Va.) Woods v. Cottrell, 1004.

6. **PROHIBITION** does not Lie Against a Justice of the peace who issues a warrant to arrest a person for keeping a slot machine as a gaming table, and to seize the machine. (W. Va.) Woods v. Cottrell, 1004.

PROMOTERS.

See Corporations, 25-27.

PUBLIC LANDS.

In General.

1. **PUBLIC LANDS—Decisions of Land Department—Errors of Law.**—If the officers of the public land department err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions. (Mont.) Small v. Bakestraw, 691.

2. **PUBLIC LANDS—Decisions of Land Department—Errors of Fact.**—For mere errors of judgment upon the weight of evidence, or upon mere questions of fact, by officers of the Land Department in a contested case before them, the only remedy is by an appeal from one officer to another of the Land Department. In such case their decision is binding and conclusive upon the courts. (Mont.) Small v. Bakestraw, 691.

PUBLIC LANDS—Patents—Trustee—Evidence.—To charge the holder of the legal title to public land under a patent, as the trustee

of another, and to compel him to transfer the title, the claimant must show that he, himself, and not the holder, is entitled to the patent, and that, in consequence of erroneous rulings of the Land Department upon the law applicable to the facts found, the patent has been refused him. (Mont.) *Small v. Rakestraw*, 691.

Homesteads.

4. HOMESTEADS—Public Lands.—Residence for voting purposes in another precinct than that in which land is situated precludes an entryman from claiming residence at the same time on the land for homestead purposes. (Mont.) *Small v. Rakestraw*, 691.

5. HOMESTEADS on Public Lands.—Residence.—Decision of Land Department as to a homestead entryman's residence on the public lands claimed as a homestead, and the bona fides of his settlement thereon, is one of fact, and conclusive upon the courts, in the absence of fraud or imposition. (Mont.) *Small v. Rakestraw*, 691.

QUIETING TITLE.

QUIETING TITLE.—One Having Title to Land, Though not in Possession, may maintain a suit to quiet title as against a trustee and persons claiming under a conveyance which is void because it attempts to create a forbidden perpetuity. (Mich.) *Casgrain v. Hammond*, 610.

RAILROADS.

Negligence.

1. RAILROADS—Negligence—Measure of Care.—If a railroad company, in the management of its business, causes unusual peril to travelers, it must meet such peril with unusual precautions, and failing in this is guilty of negligence. (La.) *Eichorn v. New Orleans etc. R. R. Co.*, 437.

2. RAILROADS—Negligence—Traveler on Space Between Tracks. The general public is not called upon to know or observe at a glance that the space between parallel railroad tracks in a city is not wide enough to afford protection to a person standing on such space, or to know the length and width of the cars upon the tracks, and such person has a right to assume that such space is sufficient and that it is not likely that two moving cars will pass each other while he is in that position, but that one of them will stop before reaching him. (La.) *Eichorn v. New Orleans etc. R. R. Co.*, 437.

Crossings.

3. RAILROADS—Negligence—Dangerous Crossings.—If a railroad crossing is especially dangerous to travelers, on account of its locality or mode of construction, or because the track is curved or the view obstructed, the railroad company must exercise such care and take such precautions as the dangerous nature of the crossing requires, and failing in this, is guilty of negligence. (La.) *Eichorn v. New Orleans etc. R. R. Co.*, 437.

4. RAILROADS—Negligence—Regulations at Crossings.—In the absence of regulations imposed by statute or ordinance seeking to meet existing conditions at dangerous railroad crossings, the railroad company must make and enforce such regulations for the safety of travelers, and failing in this is guilty of negligence, and must abide the consequences. (La.) *Eichorn v. New Orleans etc. R. R. Co.*, 437.

5. RAILROADS—Negligence of Trainmen—Dangerous Crossings. If trainmen have reason to believe that there are persons in exposed positions on the railroad track, as over unguarded crossings in populous districts in a city, or where the public are wont to cross on the track with such frequency and numbers as to be known to those in charge of the train, they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, and render the railroad company liable for injuries therefrom, although there was negligence on the part of the injured, and no fault on the part of the trainmen after seeing the danger. (La.) *Eichorn v. New Orleans etc. R. R. Co.*, 437.

Third Rail.

6. RAILROADS—Negligence—Danger from Third Rail.—A passenger wrongfully ejected from a railroad train a distance from his starting point is not a trespasser while walking back to such point upon the railroad right of way, nor does he in so doing assume the unusual risk of danger from contact with an uncovered and unprotected electrically charged third rail, of which he is not warned, and of which he has no notice or knowledge. (Wash.) *Anderson v. Seattle-Tacoma etc. Ry. Co.*, 962.

7. RAILROADS—Negligence—Question for Jury—Danger from Third Rail.—If a railroad passenger, while walking back along the railway right of way to his starting point, sustains injury, after being wrongfully ejected from a train, by reason of coming in contact with an unprotected and electrically charged third rail, of the danger from which he has no warning, or knowledge, or notice, the questions as to the negligence of the railway company, and of the contributory negligence of such injured passenger, are for the jury to decide under proper instructions, and it is error to withdraw them, and to order a nonsuit. (Wash.) *Anderson v. Seattle-Tacoma etc. Ry. Co.*, 962.

See Attachment, 1; Carriers; Master and Servant, 15.

Note.

Railway Corporations, attachment and execution, cars of, whether subject to, 664.

cars of, attachment of in a foreign state, 664.

cars of, garnishment of in the hands of a connecting carrier, 664.

rolling stock of, whether realty or personalty, 663.

RECEIVERS.

1. RECEIVER'S SALE, Effect of upon One not a Party to the Suit.—Where the property of a litigant is placed in the hands of a receiver and sold by him, the purchaser at such sale, as against persons not parties to the suit, gets no better title than was held by the person for whom the receiver was appointed, and one holding a judgment against such party may subsequently proceed under it against the property so sold as that of his judgment debtor. (Tex.) *Scott v. Farmers' etc. Nat. Bank*, 835.

RECEIVERS' AND COMMISSIONERS' SALE, Effect of as to Parties to the Suit.—A decree for the sale of property in hands of a receiver, followed by a sale thereunder, passes the claims of all the parties to the suit which are not excepted by the terms of the decree. Therefore, if one of them

is a judgment debtor, he cannot subsequently, by a sale under his judgment, obtain any title to the property. (Tex.) *Scott v. Farmers' etc. Nat. Bank*, 835.

See Corporations, 32-34.

RECORDS.

See Vendor and Vendee, 7, 8.

RES GESTAE.

See Evidence, 9-12.

RES JUDICATA.

See Judgments, 1.

RESTRAINT OF TRADE.

See Monopolies.

RIPARIAN RIGHTS.

See Waters and Watercourses.

RUNAWAY HORSES.

See Animals; Highways.

SALES.

1. **SALES, Conditional—Additional Security.**—In trover for the conversion of property described in a lien note, it is not material that a third person has given the holder of the note a chattel mortgage upon other property, in which it is stated that he has purchased the property described in the note, that the mortgage is given as additional security for the payment thereof and in consideration of the holder's forbearance to take possession of and foreclose on the property described in such note. (Vt.) *Kimball v. Costa*, 937.

2. **SALES—Terms of Payment—Nonacceptance.**—Although the terms of payment are not specified in the invoice sent with the goods sold, this is not sufficient ground for their nonacceptance by the buyer, especially when he holds a duly executed written contract as evidence of the terms of the sale. (Vt.) *Equitable Mfg. Co. v. Allen*, 915.

3. **CONTRACTS—When Severable.**—A contract for the sale of skins, setting out several distinct classes to be furnished and the price to be paid for each class, is severable, and entitles the purchaser to rescind the contract for fraud as to part of the items, and recover the price paid therefor. (Ind. App.) *Weil v. Stone*, 243.

4. **CONTRACTS—Rescission.**—A Complaint in an action to rescind a contract for the sale of goods on the ground of fraud, averring that the articles shipped were inferior in quality to those specified in the contract, and were not marketable in their condition as shipped, is sufficient in the absence of a motion to make more specific. (Ind. App.) *Weil v. Stone*, 243.

5. CONTRACTS—Rescission in Part—Evidence of Value.—If it is sought to rescind a contract for the sale of goods on the ground of fraud as to part of the goods delivered, and to recover the purchase price thereof, evidence of the value of that part of the goods is immaterial. (Ind. App.) *Weil v. Stone*, 243.

See Frauds, Statute of; Fraudulent Conveyances, 7, 8.

SAVING BANKS.

See Banks and Banking, 9-11.

SEAL.

See Judicial Sales.

SEARCHES AND SEIZURES.

See Constitutional Law, 13, 14.

SEDUCTION.

SEDUCTION—Conditional Promise to Marry.—A direct promise to marry is not essential to the crime of seduction, under a statute making it criminal to "seduce and debauch any unmarried woman of previous chaste character." Under such statute any seductive acts or promises are sufficient, and if a woman, engaged to marry, submits to her intended husband upon his conditional promise to marry her immediately in case he gets her "into trouble," the crime is complete. (Wash.) *State v. O'Hare*, 970.

SENTENCE.

See Pardon.

SETOFF AND COUNTERCLAIM.

DAMAGES—Counterclaim.—Damages to defendant arising out of breach of contract may be set up as a counterclaim to a demand for damages, for a failure to furnish plaintiff with telephone connection. (S. C.) *Gwynn v. Citizens' Tel. Co.*, 819.

SHELLEY'S CASE.

See Deeds, 4.

SHIPPING.

See Wharves.

SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE—Discretion of Court.—The grant of specific performance by a court of equity is a matter, not of absolute right, but of sound discretion. (Ind. App.) *Boldt v. Eady*,

2. SPECIFIC PERFORMANCE.—Burden of Proof is upon plaintiff in a suit for specific performance to show a full and complete performance on his part, or an offer of such performance. (Ind. App.) *Boldt v. Early*, 255.

STARE DECISIS.

See Courts.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Title of Act.

1. **CONSTITUTIONAL LAW**—Title of Statute.—If there is a "unity of object" in the various provisions of a statute, and that general object is indicated by the title of the act, then, no matter how multifarious the provisions of the act, it sufficiently complies with the constitution. (Iowa.) *Cook v. Marshall County*, 283.

2. **CONSTITUTIONAL LAW**—Title of Statute.—Acts of General Revision and codification under general and comprehensive titles are valid. (Iowa.) *Cook v. Marshall County*, 283.

3. **CONSTITUTIONAL LAW**—Title of Amendatory Statute.—The title, "An act to revise, amend, and codify the statutes in relation to crimes and their punishment," is sufficient to embrace a code section providing that "there shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property within or whereon any cigarettes" are sold or given away, or kept with intent to sell or give away, and that the tax shall be assessed and collected after the manner of the mullet liquor tax, but that it shall not be a bar to a prosecution for the penalties prescribed in another section already in existence and prohibiting the selling and giving away of cigarettes under a penalty of fine and imprisonment. (Iowa.) *Cook v. Marshall County*, 283.

Construction.

4. **STATUTES** Adopted from Another State, Construction of.—If a statute is adopted from another state, the construction there previously placed upon it has controlling influence, and the courts will presume that the legislature recognized and adopted such construction. (Mich.) *Casgrain v. Hammond*, 610.

STOCKHOLDERS.

See Corporations.

STREET RAILWAYS.

In General.

5. **STREET RAILWAYS**, Right of to Materials Removed from the Public Streets.—If a street railway company tears up a public street for the purpose of laying its track, it is entitled to use the

material so removed by it in performing its duty in placing the street in the condition required by the municipal ordinance, and the city is liable if it removes such material. (Mich.) *City of Detroit v. Detroit Ry. Co.*, 600.

6. **STREET RAILWAYS**—Constitutional Provision as to Parallel Lines.—The rule of the constitution prohibiting a railway from acquiring title to a parallel and competing line does not apply to street railways. (Tex.) *Scott v. Farmers' etc. Nat. Bank*, 835.

Municipal Corporations.

7. **MUNICIPAL CORPORATION**—Street Railway—Ordinance of, When not Ultra Vires.—An ordinance of a municipal corporation requiring it to put down a concrete foundation under a street railway track is not ultra vires. (Mich.) *City of Detroit v. Detroit Ry. Co.*, 600.

8. **STREET RAILWAYS**—Municipal Control Over.—A city may regulate the conduct of a street railway business to the extent of requiring reasonable safeguards against danger. (Mich.) *People v. Detroit United Ry.*, 626.

9. **STREET RAILWAYS**—Presumption in Favor of Ordinance Regulating.—A municipal ordinance which shows on its face that the end in contemplation is the securing of reasonable safeguards against danger will ordinarily be presumed to be valid. (Mich.) *People v. Detroit United Ry.*, 626.

10. **STREET RAILWAYS**—The Discretion of a Municipal Council in Imposing Safeguards Against Danger on Street Railways will not be interfered with on light grounds, nor where the regulation can fairly be said to tend toward a safer condition. (Mich.) *People v. Detroit United Ry.*, 626.

11. **STREET RAILWAYS**—Ordinance Requiring the Use of Air or Electric Brakes.—A court will not say that an ordinance requiring the use of air or electric brakes on street railways is unreasonable unless it clearly appears that there is no necessity for a more efficient brake than that in use, or that neither the air nor the electric brake is such. (Mich.) *People v. Detroit United Ry.*, 626.

12. **STREET RAILWAYS**—Regulations Requiring Greater Expenditures.—A municipal ordinance requiring the use of air or electric brakes on street railways will not be held invalid on the ground that it will require a large outlay or that it takes property without due process of law. All property is subject to the exercise of the police power. (Mich.) *People v. Detroit United Ry.*, 626.

13. **STREET RAILWAYS**—Municipal Authority Under Reservation of the Right to Make Further Orders, Rules and Regulations. If by an ordinance consenting to the construction of a street railway, the common council of the municipality reserves the right to make such further rules, regulations, and orders as may from time to time be deemed necessary to protect the interest, safety, welfare, and accommodation of the public, it may require such railway to use air or electric brakes on all its cars. (Mich.) *People v. Detroit United Ry.*, 626.

Passengers.

14. **STREET RAILWAYS**—Who Entitled to Rights of Passenger. A foot traveler on the highway who is approaching a street-topped to receive him as a passenger, but who has not actually entered the car, is not entitled to the rights of a passenger in respect

to the extraordinary degree of care due to passengers from common carriers, at least so far as any defect in the car is concerned. The carrier owes him no duty to keep the pavement smooth or the street clear of obstructions to his progress, nor as to the car itself, other than that it owes to all other travelers on the highway. (Mass.) *Duchemin v. Boston Elevated Ry. Co.*, 580.

15. **STREET RAILWAYS, When not Answerable for Carelessness and Resulting Unreasonable Fright and Rash Action.**—Though a street railway company is careless with respect to an electric wire, it is not necessarily answerable to a passenger whose injuries were due to his acting rashly under the circumstances and in a manner not justified by the reasonable apprehension from the surrounding circumstances that he was in danger of loss of life or of great bodily harm. (La.) *Chretien v. New Orleans Railways Co.*, 519.

16. **STREET RAILROADS—Transfers and Rights Thereunder.**—A passenger on a street-car having paid his fare and requested a transfer to some other line of the company, to which he is entitled to transfer, and by mistake having been given a wrong transfer, is nevertheless entitled, upon proper explanation, to be carried upon the line to which he requested a transfer. (Ind. App.) *Citizens' Street R. R. Co. v. Clark*, 249.

17. **STREET RAILROADS—Assault on Passengers.**—A street-car company is bound to protect a passenger from an assault and injury by its servants, and its liability for a breach of such duty does not depend upon the assault being committed by one acting within the scope of his employment. (Ind. App.) *Citizens' Street R. R. Co. v. Clark*, 249.

18. **STREET RAILWAYS—Assault upon Person on Car.**—If unnecessary and excessive force is used in ejecting a person from a street-car, he is entitled to recover for an assault whether he is entitled to the rights of a passenger or not. (Ind. App.) *Citizens' Street R. R. Co. v. Clark*, 249.

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TAXATION.

1. **CONSTITUTIONAL LAW—Mulet Cigarette Tax—Statutory Construction.**—Where a code section imposes a tax on buildings used in the manufacture or sale of cigarettes, and provides that the tax shall be "assessed, collected, and distributed" in the same manner as the mulet liquor tax, the provisions of the liquor tax law concerning assessment and collection became a part of the cigarette tax law, and should be considered in determining its constitutionality. (Iowa.) *Hodge v. Muscatine County*, 304.
2. **CONSTITUTIONAL LAW—Mulet Cigarette Tax.**—A code section imposing a mulet tax on the sale of cigarettes is not unconstitutional because it provides that the payment of the tax is not a bar to a prosecution under another code section, which absolutely prohibits the sale of cigarettes. (Iowa.) *Hodge v. Muscatine County*, 304.
3. **CONSTITUTIONAL LAW—Cigarette Tax—Notice.**—A code section imposing a tax on venders of cigarettes and on buildings wherein they are sold, is not unconstitutional because not providing for notice of the assessment of the tax to such persons, other sections of the code providing for review by the board of supervisors with power to remit. (Iowa.) *Hodge v. Muscatine County*, 304.
4. **CONSTITUTIONAL LAW—Cigarette Tax—Summary Collection.**—A statute imposing a mulet cigarette tax is not unconstitutional because providing for collection by a summary method. (Iowa.) *Hodge v. Muscatine County*, 304.
5. **CONSTITUTIONAL LAW—Uniform Operation of Statute.**—A statute imposing a mulet tax on the sale of cigarettes is not un-

-constitutional because it exempts jobbers and wholesalers doing an interstate business with persons outside the state. (Iowa.) *Cook v. Marshall County*, 283.

See Commerce; Licenses; Municipal Corporations, 9.

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TELEGRAPHS AND TELEPHONES.

Telephones.

1. **TELEPHONE COMPANIES** are Common Carriers. (S. C.) *Gwynn v. Citizens' Tel. Co.*, 819.

2. **TELEPHONE COMPANIES—Monopoly.**—A contract between a telephone company and a customer that the former will put in a telephone for the use of the latter on condition that he will not use another telephone system is void as in restraint of trade and against public policy as tending to create a monopoly. (S. C.) *Gwynn v. Citizens' Tel. Co.*, 819.

3. **TELEPHONE COMPANIES—Damages for Failure to Render Service.**—Failure to put in a telephone and furnish service at the request of a customer, as provided for by his contract, if caused by the overcrowded condition of the telephone company's business, is ground for a mitigation of damages, but is not a justification for a refusal to put in a telephone. (S. C.) *Gwynn v. Citizens' Tel. Co.*, 819.

Negligence of Telegraph Company.

4. **TELEGRAPH CORPORATIONS—Damages for Failure to Deliver Message, When not too Remote.**—A telegram reading: "Green Swearingin: Come, Frank is dead. Mrs. Swearingin"—sufficiently gives notice of a death and the desire of the sender that the addressee shall attend the burial and the expectation that he will do so, and the telegraph corporation is liable if, through its negligence, the message is not delivered in time for him to attend the funeral. (Tex.) *Western Union Tel. Co. v. Swearingin*, 876.

5. **TELEGRAPH COMPANIES—Negligent Delay—Damages for Mental Suffering.**—A telegram inquiring as to the condition of a member of one's family indicates sickness and anxiety on account of it and delay in its transmission or delivery may cause mental suffering for which damages may be recovered. (S. C.) *Willis v. Western Union Tel. Co.*, 828.

6. **TELEGRAPH COMPANIES—Negligent Delay—Question for Jury—Mental Suffering.**—Whether the addressee of a telegram would be replied to it, and whether the negligence of a telegraph company in failing to deliver it was the proximate cause of the sender's mental suffering for which he seeks to recover, is a question for the jury to determine. (S. C.) *Willis v. Western Union Tel. Co.*, 828.

TELEGRAPH COMPANIES—Negligent Delay—Damages for Mental Suffering.—The right to recover for mental suffering caused by negligent delay in delivering a telegram includes damages for the delay and for negligence which prolongs such anxiety, as well as

for other kinds of mental suffering.. (S. C.) *Willis v. Western Union Tel. Co.*, 828.

8. **TELEGRAPH COMPANIES—Negligent Delay—Evidence.**—The addressee of a telegram may, under proper pleadings, testify whether if it had been received he would have replied to it, and what such reply would have been. (S. C.) *Willis v. Western Union Tel. Co.*, 828.

9. **TELEGRAPH COMPANIES—Negligent Delay—Damages for Mental Suffering.**—Actual damages for mental anguish suffered through negligent delay in delivering a telegram must be confined to such time as elapses between the time when the sender should have received an answer and the time when he receives reliable information on the subject inquired about, but this rule does not apply to the recovery of punitive damages. (S. C.) *Willis v. Western Union Tel. Co.*, 828.

10. **TELEGRAPH COMPANIES—Negligent Delay—Mental Anguish—Evidence.**—Mental anguish suffered by the sender of a telegram, through the negligent delay or failure of the telegraph company to deliver it, cannot be shown by the statements of the sender as to his particular conclusions and apprehensions, from a failure to receive an answer to his telegram. (S. C.) *Willis v. Western Union Tel. Co.*, 828.

11. **TELEGRAPH COMPANIES—Negligent Delay—Mental Suffering—Mitigation of Damages.**—If it is sought to recover damages for mental suffering caused by negligent delay or failure to deliver a telegram, the jury may consider, in mitigation of damages, the failure of the sender of the message to use other means of communication within his reach. (S. C.) *Willis v. Western Union Tel. Co.*, 828.

THIRD RAIL.

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TITLE OF STATUTE.

See Statutes, 1-3.

TRADEMARKS.

See Constitutional Law, 7.

TRIAL.

Evidence.

1. **TRIAL**—X-Ray Photographs or Radiographs admitted in evidence may be taken by the jury to the jury-room upon retirement to deliberate upon a verdict. (Ill.) Chicago etc. Ry. Co. v. Spence, 213.

2. **TRIAL**—Violation of Ordinance—Evidence.—If a person on trial for the violation by him of a municipal ordinance seeks to attack the conduct of the city authorities, on the ground that in denying him a permit they acted arbitrarily and capriciously, it is competent to show his previous conduct, and the circumstances under which such authorities exercised the authority vested in them. (Ga.) Fitts v. Atlanta, 167.

Instructions.

3. **TRIAL**—Giving Instructions Provisionally.—An instruction should not be given to the jury and their consideration of it made to depend upon whether they find that there is evidence to sustain it. It is for the court to determine whether there is evidence to render an instruction relevant. (W. Va.) Rowan v. Hull, 998.

4. **TRIAL**—Instructions.—Although the court errs in not construing writings in evidence and in leaving their construction for the jury, the error is not prejudicial to the defendant, if the charge gives the jury opportunity of finding against plaintiff upon a question of fact concerning such construction, and the construction found by the jury is the proper one. (S. C.) Mitchell v. Leech, 811.

5. **TRIAL**—Instructions.—A charge on the facts is reversible error. (S. C.) Gwynn v. Citizens' Tel. Co., 819.

See Continuance; Criminal Law.

TRUSTS.

1. **TRUST**, Power to Terminate.—Where all the parties to a trust are of full age and it was created by an arrangement to which the trustee and the cestui que trust were the only parties, he and they may terminate it at any time. (Mass.) Matthews v. Thompson, 550.

2. **TRUST**, Writings Which may Terminate.—If A conveys property to B, who thereupon executes a declaration in writing not acknowledged nor recorded, stating that he holds the property in trust to secure certain indebtedness due to C and D and advances which may be made to E, and that, after such debts and advances are paid, the balance, if any, shall be paid to F and the beneficiaries C, D, and E unite in a request to the trustee B that he convey the property to F, which is accordingly done, the trust is terminated where such was the intention of the parties, though the state declares that no estate or interest in land shall be created, granted, or surrendered unless by a writing signed by the trustee or his attorney, or by operation of law. (Mass.) Matthews v. Thompson, 550.

3. TRUST, Termination of, When not Prevented by Prior Mortgages.—The fact that a conveyance of real property to a trustee to secure the payment of specified indebtedness and advances refers to certain pre-existing mortgages to which the trust conveyance is subject does not make the consent of the mortgagees necessary to the termination of the trust, and it may hence be ended by a conveyance made by the trustee at the written request of the beneficiaries. (*Mass.*) *Matthews v. Thompson*, 550.

See Mortgages, 8.

USURY.

USURY—Relief by Injunction.—One who executes a deed of trust to secure a usurious debt may, after conveying the land to a third person with a covenant of general warranty, maintain a bill to purge the debt of its usury and enjoin a sale of the property under the deed of trust. (*W. Va.*) *Rorer v. Holston National etc. Assn.*, 993.

VENDOR AND VENDEE.

In General.

1. REAL PROPERTY—Contract with Respect to the Use of One Parcel does not Affect Others.—The fact that persons respectively conveying to each other different parcels of land make, in connection with their conveyance, an agreement not to construct a dam affording more than a specified number of feet of fall, does not preclude a grantee of one of them, in purchasing a different parcel, from constructing a dam in connection with it uninfluenced by this agreement. (*Mass.*) *Otis Co. v. Ludlow Mfg. Co.*, 563.

2. VENDOR'S LIEN, When does not Exist.—Where one street railway corporation conveys to another, and the latter, as part of the consideration for the conveyance, agrees to build the road and operate its cars to a designated locality for a term of years, such stipulation being inserted for the benefit of the directors so conveying, no lien exists against the property so conveyed for the performance of such agreement. (*Tex.*) *Scott v. Farmers' etc. Nat. Bank*, 835.

Option to Buy.

3. OPTION—Revocation.—An Option to Buy Land, given for a money consideration, cannot be revoked during the time limited. (*W. Va.*) *Tibbs v. Zirkle*, 977.

4. OPTION—Bona Fide Purchaser.—One who takes an option on land, but does not pay the purchase money, is not a holder for value without notice. (*W. Va.*) *Tibbs v. Zirkle*, 977.

Contract of Sale.

5. CONTRACT OF SALE—Time as Essence of.—Though time is not of the essence of a contract for the sale of land originally, it may be so rendered by the conduct of the vendor or vendee subsequent to the making of the contract. (*Ind. App.*) *Boldt v. Early*, 255.

6. VENDOR AND PURCHASER—Contracts of Sale—Time as Essence of Specific Performance.—If there has been considerable increase in the value of the land after the failure of the vendee to pay an installment of the purchase price at the time stipulated in the contract of sale, this, together with notice that if payment is not made by a specified time, the land will be resold, and failure to comply with such notice may be sufficient reason for denying him specific relief. (*Ind. App.*) *Boldt v. Early*, 255.

Unrecorded Conveyance.

7. **DEEDS—Burden of Proof as Between Prior and Subsequent Grantees.**—Where a grantor, after having executed a conveyance of property which remains unrecorded, subsequently conveys it to another, the latter must, though his conveyance is first recorded, assume the burden of proving that his purchase was made and the purchase price paid in good faith and without notice of the rights of the previous grantee. (Cal.) *Bell v. Pleasant*, 61.

8. **EVIDENCE—Burden of Proof, When not Changed by Pre-existing Trust Deed.**—Where the contest is between persons claiming under different deeds from the same grantor, the second of which is first recorded, it is not material that the technical legal title was, before either conveyance was made, vested in trustees to secure certain indebtedness of the grantor. (Cal.) *Bell v. Pleasant*, 61.

See Deeds; Notice.

VETERANS.

See Constitutional Law, 6.

WARRANTS.

See Bills and Notes, 2.

WATER COMPANY.

See Contracts, 4; Municipal Corporations, 2.

Note.

Water Rights, possession of real property as notice of, 333.

WATERS AND WATERCOURSES.*Watercourses—Overflow Water.*

1. **WATERCOURSES—Overflow Waters.**—If the flood and overflow water from a river becomes severed from the main current or leaves it never to return and spreads out over the lower ground, it becomes surface water, but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs therefrom, presently to return, it is still to be regarded as a part of the stream, and cannot be obstructed to the injury of the property of another. (Mont.) *Fordham v. Northern Pac. Ry. Co.*, 729.

2. **WATERCOURSES—Overflow Waters** of a river which still form part of the channel of the stream cannot be obstructed by a railroad company by a continuous and uninterrupted fill along its right of way, to the injury of the property of another, without liability therefor. (Mont.) *Fordham v. Northern Pac. Ry. Co.*, 729.

Riparian Rights.

3. **WATERS—Right to Take Water** from a spring or a stream is an interest in the land itself, which is grantable as a right in gross or appurtenant, and is assignable, descendable and devisable. (Vt.) *Lawrie v. Silsby*, 927.

TERS—Riparian Rights—Reasonable Use.—Each riparian a right to the reasonable use of the water of the stream natural wants, and for the like wants of his family and (Vt.) *Lawrie v. Silsby*, 927.

8. WATERS—Riparian Rights—Reasonable Use.—It is a question of fact whether the use of the water of the stream made by a riparian owner for his own use, or for sale to others for nonriparian purposes is, under all of the circumstances, a reasonable use. (Vt.) *Lawrie v. Silsby*, 927.

6. WATERS—Pollution—Riparian Rights.—A nonriparian grantee of a riparian proprietor, of a right to take water from a stream for nonriparian purposes, may maintain an action in his own name against an upper riparian proprietor for polluting the water of the stream to his damage. (Vt.) *Lawrie v. Silsby*, 927.

Millsites.

7. RIPARIAN OWNERS.—Priority of Right by Appropriation is Acquired by the Millsite Act of Massachusetts by the riparian proprietor who first commences the erection of a dam, if he completes it with reasonable diligence and puts in operation a mill, though another riparian proprietor commencing a dam later succeeds in completing it first. (Mass.) *Otis Co. v. Ludlow Mfg. Co.*, 568.

8. RIPARIAN PROPRIETORS, Respective Rights of Upper and Lower.—Under the millsite act of Massachusetts the riparian proprietor first commencing the erection of a dam acquires priority of right as against proprietors on the stream above, as well as against those below. (Mass.) *Otis Co. v. Ludlow Mfg. Co.*, 568.

9. CONSTITUTIONAL LAW—Taking of Property, What is not—Statute Giving as Against Riparian Owners' Rights by the Appropriation of Water.—The millsite act of Massachusetts, under which the riparian proprietor first commencing the erection of a dam for a millsite may acquire priority of right to the use of the waters of a stream, does not authorize the taking of property by the right of eminent domain, and is constitutional. (Mass.) *Otis Co. v. Ludlow Mfg. Co.*, 563.

Dams and Overflows.

10. WATERS AND WATERCOURSES, Creating a Nuisance by Interfering With.—To Wrongfully Cause Water to Flow upon Another's Land which did not flow there naturally is to create a nuisance. (Cal.) *Allen v. Stowell*, 80.

11. WATERS AND WATERCOURSES—Constructing Dams When not Justified Because of Defects in the Construction of a Railway.—One who enters upon his land and constructs dams which cause water to flow upon and injure the lands of another cannot justify his action on the ground that it was to correct the mistake of a railway company in locating its culvert. (Cal.) *Allen v. Stowell*, 80.

Prescriptive Rights.

12. WATERS—Prescriptive Rights—Riparian Owners.—A person who, for more than forty years, under a claim of right, has taken water by means of a pipe from a brook on a riparian lot to his nonriparian farm, has not thereby acquired any right as against an upper riparian owner, who could not lawfully have interrupted such taking of the water. (Vt.) *Lawrie v. Silsby*, 927.

13. WATERS—Prescriptive Rights—Riparian Owners.—A person who, for more than forty years, has, under a claim of right, taken water by means of a pipe from a brook on a riparian lot to his nonriparian farm, thereby acquires a prescriptive right to thus take the water as against the riparian owner, although the water was

thus taken in the first instance, under a license from such owner unlimited in point of time. (Vt.) *Lawrie v. Silsby*, 927.

Note.

Ways, possession of real property as notice of, 334.

WHARVES.

1. **CARRIERS—Passengers—Injury While on Wharf.**—A person with a round-trip ticket for passage upon a steamboat, who is injured while upon the steamer company's dock, waiting for the arrival of the steamboat to commence the return trip, is a passenger, and the law governing common carriers applies to the case. (Wash.) *White v. Seattle-Everett etc. Nav. Co.*, 948.

2. **CARRIERS—Passengers—Negligence.**—A passenger, while waiting on a steamship company's dock for the purpose of boarding an incoming steamboat, is not guilty of contributory negligence in deviating from a straight or direct line between the entrance to the dock or waiting-room, and the entrance slip to the boat, and such passenger has a right to rest on the presumption that the whole dock is maintained in such manner that it can be traversed without imperiling life or limb. (Wash.) *White v. Seattle-Everett etc. Nav. Co.*, 948.

3. **CARRIERS—Negligence—Unsafe Dock.**—A common carrier by steamboat must keep in reasonably safe condition its wharves or docks, upon which passengers are invited for the purpose of boarding its boats, and maintaining a dock with a hole in it large enough to admit a human leg is negligence. (Wash.) *White v. Seattle-Everett etc. Nav. Co.*, 948.

WILLS.

Construction.

1. **WILLS—Construction.**—A will devising certain real estate and all personal property to the widow of the testator, with direction that she provide, before her death, for two named children, "out of the above-described property," does not compel her to divide the property equally between them nor prevent her from giving the land to one and the personalty to the other. (Ill.) *Biggins v. Lambert*, 238.

2. **WILLS, Parol Explanation of.**—If a will describes property devised as lot "seventy-eight" in a certain district, parol evidence is not admissible to show that lot "sixty-eight" in such district was intended to be devised, though the testator owned no such land as that mentioned in the will, and did own the land which it is claimed he intended to devise. Parol evidence is not admissible to show that although the testator in his will described with perfect accuracy one parcel of land, yet he meant another. (Ga.) *Oliver v. Henderson*, 185.

Joint Wills.

3. **WILLS—Joint.**—Two persons may at the same time unite their wills in a single instrument, if it is such that it may take effect upon the death of one of the parties, so far as it relates to the property of one. (Ill.) *Gerbrich v. Freitag*, 234.

WILLS—Joint—Husband and Wife.—The fact that husband and wife devise their property reciprocally to each other by the same instrument, or that it is a joint or mutual will, does not deprive it of effect if the will can be given effect on the death of either so far

as the property of that one is concerned. If it is of that character it may be probated upon the death of one as his or her separate will, and, upon the death of the other, can be again proved as the separate will of the other. (Ill.) *Gerbrich v. Freitag*, 234.

5. **WILLS—Joint.—Unless Provisions of an instrument executed by two persons jointly as their will are such that the disposition of the property is suspended after the death of one until the death of the other, so that it cannot be executed as the separate will of the deceased, it is no objection that the will of both constitutes but one instrument.** (Ill.) *Gerbrich v. Freitag*, 234.

6. **WILLS—Joint—Husband and Wife.—An instrument executed by husband and wife as their joint will, by which each devised his or her property, with the provision that each parcel of land should pass into the hands of devisees at the death of the owner, subject to the requirement that such devisee was to pay to the survivor during his or her natural life the current rate of rent per acre, as well as the taxes and interest on the mortgage, passes a beneficial interest in the land to the survivor, which vests at the death of the owner, and is, in effect, two separate wills, which may be probated separately as the will of each maker, and therefore valid.** (Ill.) *Gerbrich v. Freitag*, 234.

Holographic Wills.

7. **HOLOGRAPHIC WILLS.—A Testator may Take as the Date of a Will, a date previously written by him.** (Cal.) *Estate of Clisby*, 58.

8. **HOLOGRAPHIC WILLS not Wholly Written on the Day Dated.—It is not material that the concluding part of a holographic will was not written on the date the will was commenced.** (Cal.) *Estate of Clisby*, 58.

9. **HOLOGRAPHIC WILLS, What may Constitute.—A paper commencing with the words "Property of S. W. Clisby, October 1, 1902," followed by a list of property, after which is added the statement that at the death of the testator, all the above and any other property belonging to him is to go to his wife, all in his own handwriting and by him subscribed, is a good holographic will.** (Cal.) *Estate of Clisby*, 58.

10. **HOLOGRAPHIC WILLS.—A Mistake in Dating a Holographic Will, as where the figures "1859" were used when "1889" were probably intended, does not invalidate it.** (Cal.) *Estate of Fay*, 17.

See *Holographic Wills*.

WITNESSES.

TRIAL.—The Allowance of Leading Questions. is within the discretion of the trial judge, especially where the witness is examined by written interrogatories. (Ga.) *Holmes v. Clisby*, 103.

See *Evidence*.

WRIT OF PROHIBITION.

See *Prohibition*.

X-RAY PICTURES.

See *Evidence*, 5; *Trial*, 1.







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